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THE ^{2.}
GREEN BAG

An Entertaining Magazine for Lawyers

EDITED BY HORACE W. FULLER

VOLUME XII

COVERING THE YEAR

1900

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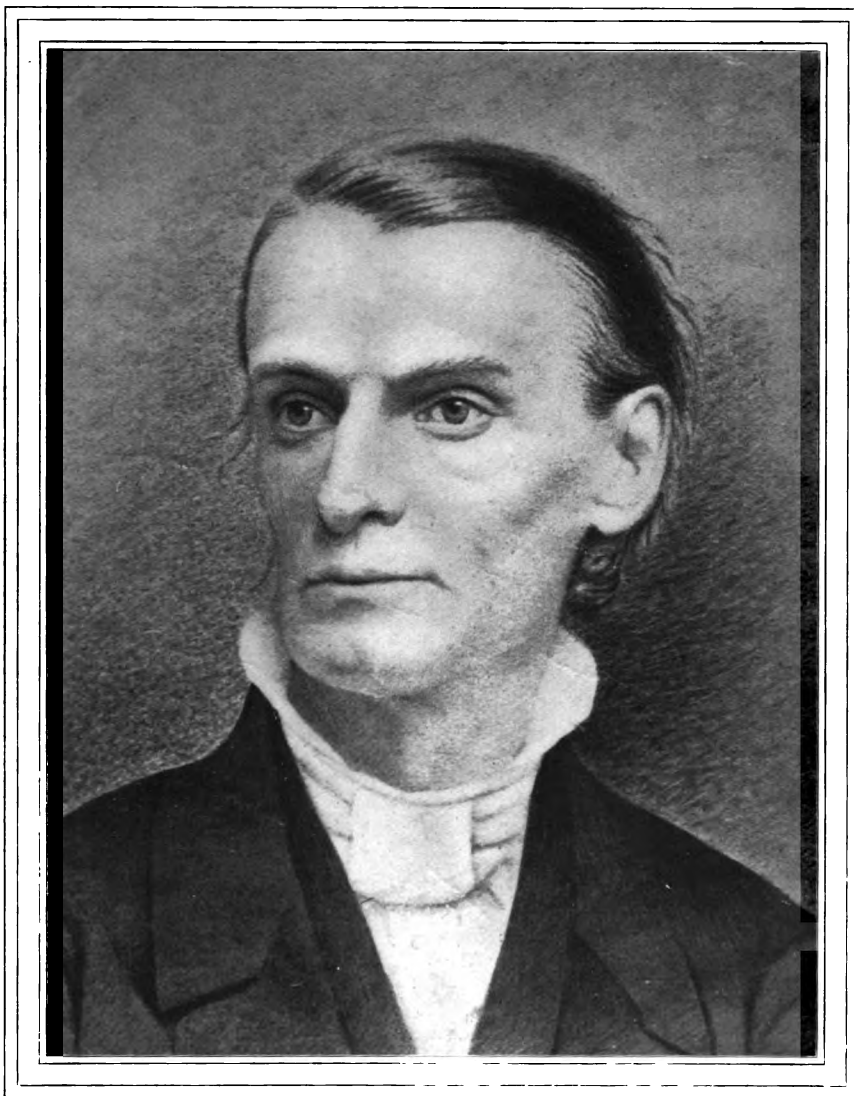
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HENRY A. WISE.

The Green Bag.

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HENRY A. WISE OF VIRGINIA.

BY EDMUND S. SPALDING.

IT would be a matter of surprise, perhaps, if it were traced, to find how many of our statesmen had stepped from the practice of law to the career of politics. Yet the power of clearly stating a position, of giving reasons for holding it, and of defending it against opposition, which the lawyer has cultivated and exhibited, naturally gives his party confidence that he will exercise the same essential qualifications in the office he may hold. That the lawyer should be tempted by the gratifying sense of popularity, by the wish to obtain certain favorite political objects which his election may forward, to say nothing of the stimulus of patriotism which may be among his higher motives, does not leave the change always unaccountable. It is not less a subject of regret, oftentimes, when the abilities and studies of a man have fitted him for success in so noble a profession as the law that he should relinquish it for a career dependent on the breath of the multitude, liable to comparative chances and changes, exposed to the use of petty motives and ignoble means, and often ending in bitter disappointment.

Henry Alexander Wise started in the profession of law, which his father had practiced, but he is remembered chiefly as a statesman. He was born in Drummondtown, Va., Dec. 2, 1806. He had the misfortune to lose his father and mother before he was eight years old. John Wise, the progenitor of the family in America, settled in Virginia in 1635, and was a man of personal consideration in ability and character.

To perpetuate the family name, he called his first two sons John and Johannes for distinction lest the other should die; and for six succeeding generations the eldest son was John. On the mother's side the Cropper family was one well known, and she was a person of personal attraction and great decision of character.

In the family of two aunts, Henry A. Wise had a kind, happy home, and a fond care which indulgently left him free to roam, and follow the impulses of a somewhat wayward will. He was educated at the college at Washington, Penn. He was heard in after life to express great indebtedness to the president, Dr. Andrew Wylie, who brought him, he said, "a wild, reckless, and neglected orphan, a self-willed boy, to love honor, truth, and wisdom, to strive to be virtuous for virtue's sake; not to imitate, but *to be* really, what can elevate one." In all the debating clubs of the college he showed a decided talent for extemporaneous speaking and skill in debates. Although not inclined to exact scholarship, he divided first honors with another student at his graduation.

He entered the law school at Winchester, Va. At one time he fell into the temptation of gambling. One night he had spent hour after hour hazarding a half-year's allowance, winning and losing. At the dawn of morning he went back to the tavern where his rooms were, and he was met at the head of the stairs by Mrs. Tucker, wife of Judge Tucker, the principal of the Law School, saying, as she came from her room,

that she could not sleep in her anxiety for him. As she extended two tracts on gambling to him with one hand, she laid the other on his shoulder, earnestly begging, "Will you read them?" He did read them by early morning light, and took home the lesson so kindly given, and never after engaged in gambling. Fortunate, indeed, was this, for it was a vice to which he would have been peculiarly liable from his adventurous, excitable, and incautious temperament. S. S. Prentiss never forgot the earnestness with which Wise once drew him back from entrance into a gambling resort, asking if he had provided for all the loved ones of his family before he gave what he had to the Cerberus of gambling hells.

The consummate folly of duelling he did not escape, but, on the contrary, he was conspicuously identified with it. Neither his principles nor his reason, which kept him from two foes,—gambling and intemperance,—turned him against the monstrous union of suicide and murder involved in duelling. Nor did his pride revolt at the implied confession of inability to use the same kind of weapon as that of the offense, since, if the antagonist deserved any notice, what other is needed than the sharp retort? Wise volunteered as principal in two duels, and, in the third instance, sent a challenge which the good sense of his friend Prentiss failed to deliver, and the difficulty was otherwise adjusted.

When Mr. Wise made his first plea in court, some one said: "There is a born lawyer for you! He will see every point, and know what to say, and how to say it. Now the criminals can have a good time, for Henry A. Wise will be able to clear them before any jury!"

But these hopes of legal success were overshadowed by the interest he took in General Jackson's career. His eloquent speeches at twenty years of age resulted in his election as a delegate to the Baltimore convention for Jackson's renomination. In 1833

Wise became a member of Congress; and during the campaign between him and Richard Coke, the opposing candidate, he delivered "twenty-seven camp speeches and one hundred and fifty cross-road skirmishes." The Twenty-third Congress was exceptionally brilliant, having such men as Webster and Clay, Calhoun, J. Q. Adams ("the old man eloquent"), Pierce, Choate, and many others of note. Wise was at that time twenty-seven years of age, and his first speech was in favor of a national bank, in opposition to General Jackson, but which he regarded as a safeguard to a sure and uniform currency for the country.

At this time anti-slavery petitions largely occupied the attention of Congress, and Mr. Wise led the ranks of animated discussion on one side. His frank, eager, electrical nature put him in touch with all his compatriots in Congress. As in youth, so in manhood, it was his fate to win love or hate, never indifference. J. Q. Adams and H. A. Wise were most frequent antagonists on the anti-slavery petitions, both persistent and ready for battle. After the death of Mr. Adams, Wise said he had been one of his best political teachers, and he often had reason to recall his wisdom and sagacity. This candor was characteristic of Wise; mingling curiously with his fiery, fierce temper, it was strangely attractive. His brilliant eyes, and ardent speech in a high but singularly sonorous voice, made it impossible to withdraw attention from him.

In 1838 a duel occurred between Mr. Graves of Kentucky and Mr. Cilley of Maine, which was exceptionally absurd in its origin, and proved fatal to the New England congressman. It arose from a severe remark made by Mr. Cilley on J. W. Webb, the editor of the "New York Courier and Enquirer," who wrote to W. J. Graves to take charge of it and obtain retraction. At first Graves declined making any intervention; but when he consented, and had no satisfaction from Mr. Cilley, he chose to

transfer the contempt of no reply as an insult offered to himself, and challenged Cilley. Mr. Wise was blamed for not exercising the influence of prevention in the case; but some fancied obligation to Mr. Graves made him aid him in the arrangement of the encounter, which resulted in the death of Mr. Cilley. The evening before this deed, which was kept prospectively very quiet, unfortunately, the wife of one of the New England members of Congress was conversing with the Maine member, and she happened to say: "Oh, it was a mere accident, as so many things are." "Yes," said Mr. Cilley, with an agonized expression passing over his face, as she afterwards remembered, "but accidents lead to terrible tragedies sometimes." No duel ever excited greater horror than this, when a New England man—a son of the Pilgrim Fathers—fell a victim to a criminal custom never tolerated in that section of the country. Nothing ever affected the personal popularity of Wise like his participation in this incident, and it was brought up as a damper to all praise of anything chivalric and attractive in him. An anti-duelling act was soon after passed in Congress.

In 1842, John Tyler appointed Wise minister to France, but the Senate rejected the nomination. He was sent subsequently as minister to Brazil. His farewell address to his constituents, as he was about to start for South America, was characteristic of him. He said: "At the earliest eligible period of life, you took me up, a poor boy, without adequate merit, and you have ever since upheld me by your generous confidence, though my faults and infirmities have been many and great." He then pleaded with them to tax themselves for the payment of the State debt, and for public schools, lamenting the proportion of citizens of Virginia who could not read and write. As a minister to Brazil, he won the commendation of all true friends of humanity by his opposition to the slave trade, all

the more praiseworthy in him as a slaveholder. In 1853 it was discontinued.

After his return to his native country, Mr. Wise resumed the practice of law, and he proved very successful as an advocate, especially in criminal trials. His study of legal precedent, his subtle and earnest oratory, had great effect. Anecdotes are told of his fertile wit and adaptation to circumstances. On one occasion he and some companions on a vacation trip happened upon a revival meeting, and an elder in charge, marking the sober expression of Mr. Wise, called on him to exhort. He knew that his companions would imbibe freely, which he did not, and he took for his text: "Wine is a mocker, strong drink is raging, and he that is deceived thereby is *not Wise*," and talked so earnestly on temperance and religion that the elder congratulated him on being so able a laborer in the vineyard.

As a member of the constitutional convention in Virginia, Henry A. Wise took a leading and very important part. There had been established in the former constitution of Virginia, in 1776, an unequal representation in regard to the tide-water counties on eastern portions of the State and those west of the Appalachian chain. A reform of this inequality was sought and eloquently advocated by Mr. Wise. He pointed out the domination of planter interest which had prevented the establishment of large towns, and the construction of railroad union between the east and west of the State. His influence was exerted for harmony and progress; and he contended that while property should be protected, it should not form the basis of legal voting. After a long and tedious debate, in which Wise was taunted with radical and revolutionary views against property, which would divide the State, a new constitution was formed, and Virginia took a long stride in just legislation.

In 1854, Henry A. Wise was nominated as a candidate for governor of Virginia

against Mr. Flournay, an able, popular, and respected candidate of the Whig party, reinforced as it was at that time by the Know-Nothing party, which had been formed through terror of the power of foreign immigration. Wise travelled over three thousand miles, speaking constantly through five months of the year, and the vote of the people was given for him as the Democratic standard-bearer.

It was during the administration of Henry A. Wise as Governor of Virginia, in October, 1859, that John Brown and his followers made the attempt to seize Harper's Ferry to effect the abolition of slavery. Whatever may be thought of the integrity of the man, no reasonable person can approve of his methods. That he was sincerely antislavery, courageous, and self-sacrificing, may be allowed, with gratitude that the mischief which might have been wrought to innocent women and children in such an uprising as he planned was averted by the failure of means unfitted for their purpose. Multitudes of letters were sent to change his sentence to imprisonment as a monomaniac, but there seemed to no one who saw him any evidence of insanity, and his execution took place in December, 1859. It is a proof of the candor of Governor Wise that, six years after this event, John Brown was mentioned in his presence, and he eagerly exclaimed, "John Brown was a great man, a great man, sir!" He could distinguish between a disinterested purpose wrought out with personal courage, and the mistake respecting the question of judgment and means. It is possible that, to an organization like his, there was an attraction in the rash adventure, singularity, and daring of John Brown, which a broader, wiser reformer would not have had for him.

In 1861, Mr. Wise was a member of the State convention at Richmond to consider the relations of Virginia to the Federal government. At first his report, after emphasizing State rights, a partition of territories

among the two slavery and anti-slavery interests, counselled a peaceful adjustment of difficulties. He was opposed to secession, and advocated fighting for the Union. But when Virginia seceded, he entered heartily into the war, and was appointed a brigadier-general. Subsequently he was sent to Roanoke Island; and a son of his, Captain O. J. Wise, was lost in an attack on the island by General Burnside. General Wise was ill of pneumonia at the time, and felt that Providence had doubly afflicted him in the loss of his brave son and in his own enforced inactivity.

He had the affection of his soldiers, as he had experienced the attachment of men in other walks in life, and he was very much touched by their insisting on sharing with him the contents of any boxes or other tokens from home. Between General Wise and Jefferson Davis there was not personal friendship, as the general disapproved of the civil administration of the Confederacy, and was unsparing in his criticism of it. This did not lead Davis to give him any military advantage, and he was intentionally kept with his troops in garrison positions rather than in prominent combinations. Still he saw active service for four years. He had said, when he left the allegiance to the Union, with tears in his eyes, "I shall always love the dear old Union"; but General Lee said of him that his unconquerable spirit shone forth as conspicuously at the last, as at the first, of his military career. When his house in the eastern part of the State had been taken by the United States authorities, a school for colored children was kept in it, the daughter of John Brown teaching in it, with her father's portrait hanging on the wall!

After the war, Mr. Wise, in his sixtieth year, resumed the practice of law in Richmond. He had given up the best years of his life to politics; but he was well grounded in the principles of law, and he threw his old earnestness and such knowledge as he

had into every cause he undertook. He was never again a participant in public affairs, except to contribute an occasional article of comment to the public press.

During his last years, Mr. Wise wrote and published a work entitled, "Seven Decades of the Union,"—a treatment of American history from 1790 to the period of the Civil War. The last year of his life he contemplated moving to a home in more rural scenes, which he preferred to city life; but his health failed, and on Sept. 12, 1876, he passed away.

Various interesting sketches and memoirs have been written of Henry A. Wise, and from them all the impression is given of a rash, impulsive, generous, brave, warm-hearted man; as Judge W. W. Crump says of him, "a knight-errant armed *cap-à-pie*

for every fray." "In his whole life he had never been found heading majorities," but was seen fighting against what seemed to him wrong.

The most fascinating, as well as the most complete and just biography of him is the recent one by his grandson, Barton Haxall Wise, who departed this life, at the early age of thirty-three, Feb. 6, 1899. It is a touching incident that he felt keenly that, among the many tributes to his distinguished grandfather, no thorough and connected record of his career has been preserved; and to the duty of supplying this deficiency he devoted himself with enthusiastic conscientiousness, sparing no pains for its completion. He waited eagerly for the result of his labors in print, and the first proofs were lying upon his desk when his brief life closed.

CHAPTERS FROM THE BIBLICAL LAW.

BY DAVID WERNER AMRAM.

I.

THE CASE OF ZELOPHEHAD'S DAUGHTERS.

THIS case is unique. It is the only reported case in the Bible in which property rights are decided by a regular judicial proceeding, and in which the parties are known. It is unique, furthermore, because of the re-opening of the case, upon the petition of the defendants, and the intrusion of a political question to modify the original decision. The case is reported three times, a fact which sufficiently indicates its importance, in Numbers xxvii, 1-11, xxxvi, 1-13, and in Joshua xvii, 1-6. It is full of interest, not only because of the importance of the questions decided therein, but also because of the view that it gives of ancient legal procedure.

In our examination of the case, we will

quote it *in ipsissimis verbis*, with such explanations interpolated as the exigencies of the text require. The report in Numbers xxvii begins thus:—

"Then came the daughters of Zelophehad, the son of Hephher, the son of Gilead, the son of Machir, the son of Manasseh, of the families of Manasseh, the son of Joseph; and these are the names of his daughters: Mahlah, Noah, Hoglah, and Milcah and Tirzah." Here for the first time we have a record of women appearing as plaintiffs. This is the more remarkable when we consider the state of women in ancient oriental societies. "And they stood before Moses, and before Eleazar the priest, and before the princes and all the congregation, by the door of the tabernacle

of the congregation." The high court before which this case was presented consisted of Moses, representing the political power; Eleazar, the high priest, representing the ecclesiastical power; the princes or chieftains, representing the tribal organizations; and the "congregation," the meaning of which is not clear. It certainly could not mean the whole people, and probably meant a body of the leading men of the people constituting an integral part of the court. The court sat at the door of the sanctuary. Anciently the judgment place was at the gate of the town, where the market place was; later on it was at one of the gates of the city; and finally the notion that judgment is spoken at the gate had become so familiar that when the court was removed to the sanctuary at Jerusalem, it sat at the door of the sanctuary, even as in the report of this case it sat at the door of the tabernacle in the wilderness. The five women then approached the court in session "saying, Our father died in the wilderness, and he was not in the company of them that gathered themselves together against the Lord in the company of Korah," hence was not attaint and could transmit his inheritance, "but died in his own sin," a natural death, "and had no sons." Hence his inheritance would, under the old law, descend to collateral kinsmen, and the name of the deceased would be forgotten in his family. Against this his daughters protested, "Why should the name of our father be done away from among his family because he hath no son?" Why should not the name be perpetuated through the daughters, and the family inheritance descend to them? There was no equitable reason for refusing their petition: "Give unto us, therefore, a possession among the brethren of our father." Relying upon a rule of inheritance peculiar to their tribe, contrary to the immemorial rule by which property descended to the heirs male, to the exclusion of the women, and resting upon the simple justice of their contention, these five women were

emboldened to present their claim. It seems that there were still traces of the matriarchal state of society, in which kinship was reckoned through the females, and the devolution of property followed a similar rule. The matriarchate was not entirely unknown among the ancient Hebrews, and there are Bible references which are inexplicable without this theory to guide us. Perhaps some traditional rights had persisted in certain families of Manasseh, or perhaps in the whole tribe, unchanged by the common law of the nation, just as customs of the manor persisted in England, and local customs everywhere survive the levelling tendency of general legislation. At any rate, the problem presented to the court was not one to be dismissed by mere reference to the law limiting the right of inheritance to the males, and the court retired to consult. "And Moses brought their cause before the Lord." If we follow the traditional orthodox interpretation of this verse, it means that Moses went to consult God to obtain light in this case, and, as the next verse shows, God gave him a decision. No doubt the writer of the narrative in the Book of Numbers believed that this was the manner of the procedure, and that Moses actually was directed by God to decide the case as he did. It is not unlikely, however, that the true procedure was simply this: that Moses retired, with or without the rest of the court, to consider the question, and finally rendered the decision. The Oriental looked upon the judge as the actual representative of God, and the judgment as the decision of God himself, probably because the fact that the judge was usually the priest made the judgment partake somewhat of the nature of a priestly act. At any rate, from this crude idea arose the notion that judgment when rendered in righteousness is divine, and that the mouth of the judge is as the mouth of God. In the Talmud we find that the general dictum, "the words of the rabbis are as acceptable as the words of the Torah,"

means simply that the rabbis, by virtue of the fact that they were the lawful judicial authorities, had the right to render decisions, and that their decisions had the same force as the written word of God. This view, which is the only rational one, is generally accepted in the Talmud, and is commonly attacked by theologians, because it minimizes the importance of the written word of the Bible, and hence interferes with the dogmatic superstructures that theology has reared upon the Biblical texts. But no written law is sufficient for all times, and men must interpret, extend, and even repeal it, when the conditions of human life compel, for the law was made for man. Now, after Moses had "consulted God" he reached a decision; "and the Lord spake unto Moses, saying, The daughters of Zelophehad speak right; thou shalt surely give them a possession of an inheritance among their father's brethren; and thou shalt cause the inheritance of their father to pass unto them." Thus far the decision in this case. No reason is assigned for it, and no general principle is laid down as its foundation. It appears to have been a judgment rendered in this case because of some circumstances unknown to us, — more than likely because of some special rule of inheritance which existed in this family or tribe. If we note the precision with which the names of the parties and their pedigree are established in the opening verses, we are strengthened in this view, that the decision was one which was dictated by the peculiar custom obtaining in this family or tribe, more especially when we note that in the report of this case, in Joshua xvii, 1-6, the following rule is stated: "because the daughters of Manasseh had an inheritance among his sons." It seems to distinguish the tribe of Manasseh from the other tribes, and limit the rule to them. This is in full harmony with our theory that this was a special case, decided according to a custom peculiar to that tribe, and that it was not

until afterwards that the decision in Zelophehad's case became a general law. I say "afterwards" advisedly, although in the Biblical text the general law is cited immediately after the decision; for the mere proximity of laws in the Bible is no proof of their relative chronological order. The Talmudists, who were no modern Biblical critics, but who were free from much of the dogmatism that blinds the eyes of the wise men of our day, recognized the fact that the Biblical laws appear in no regular chronological sequence; and, indeed, there is ample proof of this theory. The general law of succession was as follows: "And thou shalt speak unto the children of Israel, saying, If a man die and have no son, then ye shall cause his inheritance to pass unto his daughter. And if he have no daughter, then ye shall give his inheritance unto his brethren. And if he have no brethren, then ye shall give his inheritance unto his father's brethren. And if his father have no brethren, then ye shall give his inheritance unto his kinsman that is next to him of his family, and he shall possess it; and it shall be unto the children of Israel a statute of judgment, as the Lord commanded Moses."

The decision rendered by the court was, however, not allowed to rest undisturbed. By it the daughters of Zelophehad had been declared to be the lawful heiresses of their father's estate. The parties aggrieved were the next of kin who, in default of male issue, had, under general immemorial custom, the right of inheritance. They were, therefore, practically the defendants in the original proceeding, which may be likened to our action of ejectment brought by the daughters to try the title to their father's estate. The defendants appealed from the decision, and sought to have the case re-opened (Num. xxxvi, 1-13), "And the chief fathers of the families of the children of Gilead, the son of Machir, the son of Manasseh, of the families of the sons of Joseph, came near and spake before Moses, and before the princes, the chief

fathers of the children of Israel." The chief fathers were, under the patriarchal system, the representatives of their respective families,—the presidents, as it were, of the several little corporations which constituted the tribe. "And they said, The Lord commanded my lord to give the land for an inheritance by lot to the children of Israel; and my lord was commanded by the Lord to give the inheritance of Zelophehad our brother unto his daughters; and if they be married to any of the sons of the other tribes of the children of Israel, then shall their inheritance be taken from the inheritance of our fathers, and shall be put to the inheritance of the tribe whereunto they are received; so shall it be taken from the lot of our inheritance. And when the jubilee of the children of Israel shall be, then shall their inheritance be put unto the inheritance of the tribe whereunto they are received; so shall their inheritance be taken away from the inheritance of the tribe of our fathers." The point made by the defendants was based upon the fundamental conception of the tribal ownership of land, the individual having the perpetual use thereof in his own family. The land was therefore inalienable except with the consent of the tribe. The decision in Zelophehad's case had unsettled this rule. By making the women absolute heiresses in default of male issue, it subjected the property to the danger of absorption by other tribes in the event of the marriage of an heiress outside of the tribe of her fathers, and there would be eventually a mixing up of tribal lines that would obliterate them altogether. The chiefs of the tribe of Joseph were not yet prepared for this step, and the case seems to mark the transition from the tribal to the individual ownership of land, and from the old tribal organizations into the greater national union of all Israel. It was a step on the road to imperialism. As the chiefs pointed out, at the time of the jubilee, when every man's land returned to him or

his heirs, this land would no longer return to members of the tribe of Manasseh, but would fall to some descendant of the daughters of Zelophehad who would not be a member of the tribe of Manasseh, but of the tribe to which the husband of the heiress belonged. This had to be guarded against. The court was likewise impressed with the force of the argument, and apparently held the same conservative view as the defendants concerning the political question involved. It therefore re-opened the case and modified the decree already made. "And Moses commanded the children of Israel, according to the word of the Lord, saying, The tribe of the sons of Joseph hath said well. This is the thing which the Lord doth command concerning the daughters of Zelophehad, saying, Let them marry to whom they think best; only to the family of the tribe of their father shall they marry. So shall not the inheritance of the children of Israel remove from tribe to tribe; for every one of the children of Israel shall keep himself to the inheritance of the tribe of his fathers." This decision therefore prevented the injury to the tribal rights of the defendants, and established the right of inheritance of the daughters upon the condition that they marry within their own tribe. If they married outside the tribe, they lost their estate.

We are assured, however, that the five young women through whose case the law of succession was established, were wise enough not to forfeit their inheritance; for "even as the Lord commanded Moses so did the daughters of Zelophehad; for Mahlah, Tirzah, and Hoglah and Milcah, and Noah, the daughters of Zelophehad, were married unto their father's brothers' sons; and they were married into the families of the sons of Manasseh, the son of Joseph, and their inheritance remained in the tribe of the family of their father." As in the former decision in this case, the ruling of the court became the basis for a general

statute: "And every daughter that possesseth an inheritance in any tribe of the children of Israel shall be wife unto one of the family of the tribe of her father, that the children of Israel may enjoy every man the inheritance of his fathers. Neither shall the inheritance remove from one tribe to another tribe; but every one of the tribes of the children of Israel shall keep himself to his own inheritance." So that the special custom of the tribe of Manasseh, through the medium of the case of Zelophehad's daughters, became the general law for all Israel.

The interest of this case lies in the fact that it is a guide to the manner in which the ancient customs of the wandering Hebrew tribes crystallized into law, and shows how the local or special custom of the dominant tribe might become the general law of the land. For the influence of the tribe of Manasseh was very great. It was a division of the great tribe of Joseph, the ruling tribe in Northern Palestine.

To him who considers the Pentateuch the work of Moses, all of it literally inspired by

God, the case of Zelophehad's daughters has no special interest or importance. To him the whole Bible is unintelligible; for he necessarily misses the point, that the records here preserved extend over centuries of time, and represent different stages of legal and social progression. To the lawyer familiar with the history of the common and Roman law, and the origins of legal institutions, the Bible will become more and more interesting, according to his ability to disencumber his mind from the notions engendered by Sunday-school methods of Bible reading. For the Pentateuch is not a unit, — a single work written by one man. It contains the germ, the first shoot, and the fully developed legal system, all mingled, but perfectly distinguishable, and capable of being put together in the order of their natural growth. He will not be hindered from using the Bible as a guide in ethical matters, nor, by approaching it in a spirit of free inquiry, will he lose anything except the prejudices which are unfortunately created by dogmatic tradition.



LEGAL GLEANINGS FROM AFRICA.

BY GEORGE H. WESTLEY.

A FEW hundred miles west of the Transvaal lies Damaraland, which has been called a South African Arcadia. The traveler in that country is impressed with many things, among them not least with the complete communistic freedom with which the people appropriate the land and its products. If one sees a spot that strikes his fancy, he is at liberty to settle upon it and build a house. The stranger is quite as welcome to do so as the native. As long as he remains there, the land is his, but when he leaves, it reverts to the community. Some years ago the German missionaries offered to purchase land on which to erect their schools and churches. "No," said the chiefs. "You may live in our country as long as you wish and no one shall molest you as long as the land belongs to us, but we will not sell a bit of it to any man."

The same communism prevails with regard to what the earth bears or conceals. Everyone takes of its treasures wherever he finds them. Pasturage is free, and the fruits and ores of the land belong to all alike. When a thing has been separated from the earth, however, it belongs to the person who first secured it.

Game belongs to the hunter who kills or wounds it. If a second hunter comes along and kills an animal already hit by another, the game belongs to the first. Their laws are well defined on this matter. When hunting parties are made up, the right to fire the first shot passes from one to another by turns, so that it is possible for each to get a piece of game. The hunter who has the right to fire the first shot is the real hunter, the others are, for the time being, only his assistants. If the hunter misses entirely, he

cannot shoot again until all the others have had a turn.

Among the more singular laws of the country—laws which are mainly customs fixed by time and sustained by authority—are those concerning acquired property. Here their communism narrows down to family limits. It is the right of relatives to appropriate each other's goods to their own use, unless the owner is there to prevent. This right is exercised without scruple, and sometimes leads to comical scenes.

A traveller in Damaraland relates the following: "A wealthy old chief, who had hundreds of dependents, possessed numerous articles of European clothing, without owning a complete suit; but whenever he went out he had to put all his clothes on, however hot the weather. He came to me to be photographed one day, having on a pair of shoes, three pair of thick moleskin trousers, a waistcoat over an indefinite number of shirts, a large shawl around his body, a thick jacket, another shawl around his neck, a heavy dressing gown over all, and three caps of assorted styles on his head; and all this in a heat in which his aboriginal nakedness would have been much more comfortable—because he was afraid, if he left the garments at home, the members of his household would appropriate them. The same chief asked one of my friends for a piece of soap, so that he could wash his clothes himself; for he was afraid if he gave them to anyone else to wash, they would not be returned."

The chief was very anxious to get a trunk with a lock on it. If the clothes are locked up, they are safe, for it is considered stealing to take them when they are thus secured;

but if the trunk should be left open, Damara custom permits the clothes to be lifted out and carried off.

There are certain articles, however, which may be devoted to special uses, or to special persons, by a form of consecration, when the right to them is respected. A custom of this kind has prevailed from antiquity in regard to cattle and milk-vessels. Often, too, the head of the house has the right to the first use of things; in some sections they are his so long as they are whole, but as soon as they are damaged, the relatives are at liberty to take them, if they get an opportunity.

While European civilization is undoubtedly making great headway in Africa, among many tribes, especially in the interior, ancient superstitions and primitive customs still prevail.

One of the chief weaknesses of the natives of Africa is thieving. For this crime almost every tribe has its own peculiar method of detection and punishment. In Bechuanaland, the thief gets off rather easy. When a theft takes place, it is reported to the chief, who sends the town crier round to give public notice that a certain article has been stolen, and is wanted by the chief, and must be forthcoming. It is usually restored in the darkness of the night, and the culprit is thus allowed to escape detection. An English resident relates how he lost a pair of trousers, and the crier having gone round, the trousers were found next morning suspended at the entrance of his cattle-pen.

If a native has become by habit and repute a thief, in Bechuanaland, he is punished by having his fingers forced into a pot of boiling fat; in extreme cases the whole hand is forced in. If caught in the act after this, he is punished with death.

The natives of the Congo have several peculiar methods of discovering a thief, or rather of pretending to discover him. One is for the witch doctor to take a long woollen or linen thread, and holding one end

himself, to give the other to the supposed thief; he then applies a red hot iron to the middle of the thread, and if it burns, which is not unlikely, the man is thus proven guilty, and has to replace the stolen article.

MacBrair tells us of a peculiar method of detection in cases of theft in Shoa. They have an official known as the "thief-taker." When this individual is informed of a theft having been committed, he calls his servant and makes him swallow a mixture of black meal and milk, and then smoke a quantity of tobacco. This has the effect, or supposed effect, of putting the lad into a frenzy, when his master leads him through the streets by a string tied round his body, the boy crawling on his hands and feet and smelling about like a dog. Presently he stops before one of the houses, having sniffed out the thief. The thief-taker enters and arrests the owner, who is regarded as the thief without any other evidence, and is compelled to pay for the stolen article according to its sworn value.

In Ashanti, theft is usually punished by a fine, sometimes, in serious cases, by death. It is the law that the thief has to restore not only the stolen property, but also the value of all produce or profit which might reasonably have been supposed to accrue from the thing stolen. This has frequently led to the shrewd proceeding of letting a theft pass unnoticed for weeks and months. If a ewe was stolen, the owner might let the matter rest for two or three years even, and when it pleased him he could demand compensation from the family of the thief for the value of the ewe and such lambs as it might reasonably be supposed to have borne, and the value of all the probable progeny of the latter also. In this way damages accumulate at a terrible rate.

In this same country we find many other peculiar things. Wives and slaves are looked upon as property in Ashanti, and they may be pawned whenever their owner finds it necessary to pay a debtor or raise a loan.

The head of a family has the right also to pawn any of his relatives.

When a person is pawned on account of a debt, he has to work for his new master; but although his services may cover a period of years, they count for nothing towards the liquidation of his owner's debt, and the pawnholder may keep him until the amount of the original debt, with fifty per cent interest, is paid. Nor is the account settled should the pawn die, the debtor must either pay up, or substitute another pawn in place of the deceased.

Still more singular is the law that a creditor, when he finds it impossible to collect from his debtor, may seize the property of a third party, who, however, must be of the debtor's tribe and town. The value of the property thus seized may be out of all proportion to the amount due, but the seizer is not bound to make restitution of the balance, and the unfortunate third party is left to recover from the delinquent debtor the value of the property taken. This practice is gradually dying out, but is still resorted to in small debts.

Some such law as this was found by Mungo Park to exist between the natives and foreign traders near the Gambia River. "When a native takes up goods on credit and does not make payment at the time appointed, the European is authorized by the laws of the country to seize upon the debtor himself, if he can find him, or if he cannot be found, on any person of his family; or, in the last resort, on any native of the same kingdom. The person thus seized is detained, while his friends are sent in quest of the debtor. When he is found, a meeting is called by the chief people of the place, and the debtor is compelled to ransom his friend by fulfilling his engagements. If the debtor cannot be found, the person seized on is obliged to pay double the amount of the debt, or is himself sold into slavery."

Imprisonment for debt is not unknown on the Gold Coast, and when it occurs the

prisoner has to supply his own food, or failing to do this, he is compelled to earn his board by hard labor. More often, however, primitive methods, such as "sitting dharna" are resorted to. One way is for the creditor to swear that if by a certain time the debt be not paid, he and the debtor must both forfeit their lives. If the time passes without the bill being settled, nothing can save either debtor or creditor, they must kill themselves, and the guilt of murder and suicide is on the debtor's soul.

"Killing oneself upon the head of another" is the term employed when a person commits suicide declaring he was driven to it by the conduct of another. Native law requires that other person to go and do likewise immediately, though the matter is sometimes compounded by the payment of twenty ounces of gold dust to the suicide's family.

In this connection we may read with interest the true case of Adua Amissa, a noted beauty of the Cape Coast, who fell a victim to the rigor of this law. Of her and her tragic end, Cruikshank says: "The fame of Adua Amissa is still kept fresh in the memory of the natives by the songs which they sing in honor of her death. People are still alive who remember the great beauty which hurried her to an early grave. She became the object of a devouring passion on the part of a young man of the Cape Coast. Her relatives, considering that her charms authorized them to expect a brilliant alliance, refused to admit his addresses. This rejection so preyed upon the mind of the disappointed, that his life became insupportable, and he determined to sacrifice himself to his passion. He resolved, however, that Adua Amissa's family should dearly rue having spurned his suit, and in the spirit of an inextinguishable vengeance, he shot himself, attributing his death to his unrequited love, and invoking his family to retaliate it upon his murderess. The family of the unhappy girl endeavored to avert this fate by offering

to pay a large sum in gold; but nothing but her death would satisfy the vengeance of the youth's relatives, and they appealed to the native authorities to vindicate their law. All the mercy which could be extended to Adua Amissa was to allow her a few days to lament with her family her untimely end, and to have a silver bullet put into the musket with which she was compelled to deprive herself of life. She employed the few days of respite in singing with her young friends her farewell dirge, and completed the cruel sacrifice by shooting herself."

Another phase of this singular law demands that if a man swear by the king's head that another shall kill him—that is, invokes the king's death if the other do not kill him—the person so called upon must kill the oath-taker, or forfeit his own life; otherwise, according to their belief, the life of the king would be imperilled. But, rather strangely at first thought, the man who has thus been compelled to kill another is not exonerated from the consequences of his act. He is in the eyes of the law a murderer. This law, which appears unjust, is founded upon the idea that no man would compel another thus to kill him, unless he had received some unusually great injury at his hands.

Among the natives of the Gold Coast, it is customary when a person is taking oath, for him to swallow something which appertains to a deity. If it is a marine god that is sworn by, a little sea water or a bit of sea weed is swallowed; if a river god, some water or a fish from the river, or perhaps a little mud from its banks; and if a god dwelling in hill or forest, a few berries or leaves from the locality he is supposed to inhabit. The person administering the oath then calls upon whichever god it may be, to

visit any breach of faith with immediate punishment.

They have a way of punishing slander by making the offender walk through the town or village carrying a heavy stone. An officer of the court follows close behind, and in conspicuous places he halts the prisoner and beats a gong. The slanderer is then compelled to recant his base falsehoods and to confess his disgraceful behavior, which he does amid the sneers and jeers of the crowd. The heavy stone so carried is called *oturbiba*.

Their laws are very strict in the matter of borrowed articles. If a borrower uses an article or implement for any other than the specific purpose for which he borrowed it, he is liable for considerable damages. Thus, A loaned his axe for a month to B, who said he wanted it to cut some bamboo trees. B does not use it to cut bamboo trees, but to cut odum wood. A can claim his axe back before the end of the month, and compel B to give him compensation from the proceeds of the odum wood.

In Coomassie, they have a number of singular laws, which probably have been proclaimed at the caprice of successive kings. Here are a few of them:—

- No goat may be brought into Ashanti territory.
- No one may whistle in Coomassie.
- No palm oil may be spilled in the streets.
- No one may smoke a European pipe in the streets.
- No egg must be suffered to break in the streets.
- No vulture may be molested.
- No load packed in palm branches may be carried into Coomassie.
- It is death to pick up gold that has been dropped in the market-place.

The last mentioned is connected with the country's revenues, the gold dust which accumulates in the market place being collected for state purposes in national emergencies.

THE FOLLIES OF LEGISLATURES.

BY ELTWEED POMEROY.

THERE is a story told of how the two English egotists, Oscar Wilde and the painter Whistler, once met on the streets of London, and Wilde said to Whistler: "Ah, the dear public thinks when we meet and talk, that we are talking of art, but instead we are talking of ourselves, aren't we?" Whistler happening to be both an abler man and a wit, replied: "My dear Wilde, you greatly mistake; when we meet, we don't talk of ourselves, we talk of myself."

So the dear public often thinks that when legislatures meet they talk about the needs and wishes and sufferings of the great common people, but if it got behind the scenes it would find that subject given scant attention save as it affects each legislature's future; and that too often the talk is about "ourselves," while the voting usually has reference to "myself." So long as we give a committee of men uncontrolled power over us, for just so long will they use that power for their own ends. And if they are chosen frequently, as our legislators are, they will retain a certain portion of the noble spirit of service to the whole people as long as they are new at the service, crude and inefficient. They will make lots of mistakes, be easily led by designing men who know the ropes; and by the end of the term either be ready to retire in disgust because they deem nothing can be accomplished, or to adopt the prevailing low moral tone, look at every bill from the point of "What is there in it for me?" and be fit subjects for the lobbyist.

Thus the last legislature of the sovereign State of Missouri passed a bill called the "Pure Beer Law" through both houses, and it was signed by the governor. This provides that "no person or persons or corporation engaged in the brewing or manufacture

of beer or other malt liquor, shall use any substance, material or chemical in the manufacture of beer or other malt liquors other than pure hops or extract of hops or pure barley, malt or wholesome yeast or rice." Water is not mentioned, and as nothing but the above substances may be used, the people of Missouri are wondering whether they will take their beer in solid form, or how. Perhaps some one will come out with beer tablets.

Down in Texas the lower house passed what was called a "Single Tax Law"—which it was with a vengeance. It provided that every unmarried man over thirty who had not "exerted due diligence" in getting married should pay a fine of \$50 every year. In order to define "due diligence" the bachelor's fine was to be remitted if he brought in yearly an affidavit from some reputable woman that he had offered himself in marriage to her during that year.

The 1897 Missouri legislature also had a "Single Tax Law," but it took the other tack and fined widows and maidens "not less than \$100 nor over \$500" for rejecting a man. It was finally amended to add to the fine the provision that the fair one should darn the socks and sew on buttons for the rejected suitor for six months. This laughed it out of the house.

But the West is not the only offender. New Jersey passed a law taxing bachelors in 1846, and as I never heard of its repeal, it may be still accumulating dust among the archives, and is one of those things the executive swears to enforce, but does not know of and practically cannot know because there are so many of them. But the 1898 New Jersey legislature sent to be engrossed a law for taxing bachelors. It is about on a par

with the one introduced in 1896, in the same State, prohibiting the picking of huckleberries with the feet.

At Albany one of the Tammany legislators who did not know a bill from a highwayman's billy, was told he ought to have a law named after himself; so he introduced a measure and secured its passage through the Assembly which made it a penal offense to put less than thirteen oysters in an oyster stew. This would be hard on church fairs. Another august legislator—I presume he was from the "rural districts" this time—introduced a bill making it a felony to entice away bees, particularly when they are swarming, and this was only killed by a city member moving to amend that every bee should have its owner's name and address stamped on its business end for identification.

But this is not worse than the ordinance introduced into the common council of New York City, which its mover explained as follows: "One of the greatest perils of this big city," he said, "is the danger of being run down by street cars. Every person hit by a street car is struck by the front platform. Am I right? Of course I am. You never heard of a man being knocked down by the rear platform or by the side of the car. Now the remedy is simple. My resolution abolishes front platforms."

Another kind of law, passed in Nebraska in early days, has an equally funny mistake in it. A part of it reads: "For the violation of the third section of an act to license and regulate the sale of malt, spirituous and vinous liquors, twenty-five dollars, and on proof of the violation of said section or any part thereof, the justice shall render judgment for the whole amount of costs and be committed to the common jail until the sum is paid." If this law was enforced many a justice in Nebraska would languish in the common jail.

Similar to this is bill No. 251 of the Kentucky legislature which reads: "It shall be

unlawful for any person to fire or discharge at random any deadly weapon whether said weapon be loaded or unloaded." Really that legislature must have had in view the damage done by weapons thought to be unloaded.

Michigan has on its statute books the Waite Anti-treating law, passed in 1895, which prohibits the purchase of liquor to be given to another as a treat; and in South Carolina private dispensaries became so obnoxious that a bill was introduced making it unlawful for a citizen of that State to wear hip-pockets in his trousers, the minimum penalty being \$150 and six months' imprisonment. Ye gods and little fishes! What would the governor of South Carolina do when he was visited by his brother of North Carolina? Despite the fact that the "Outlook" is the authority for the statement, I think we may well believe that the governor of South Carolina vetoed it when it came into his august presence. But I would call his Honor's attention to the action of the Ohio law-makers in 1898 as worthy of imitation even if he had to issue a special message recommending it. They defeated the Adams bill legalizing the weakening of whisky with water.

The Kansas lower house of 1898, while one of their members with an unpronounceable Russian name was absent, rushed through a bill changing his name to Pat Murphy. I cannot remember the name, but if I could write down such an unheard-of jumble of consonants and vowels, you would also judge that this was an unusual inspiration of common sense.

An illustration of one of the tragedies of our law-making is the effort of the Pennsylvania miners, extending over years, to get a law prohibiting the payment of wages in store orders. They got such a law through a year or so ago. But in some committee, or in engrossing, the words "on demand" were inserted, so that the law reads: "All wages shall be paid in cash on demand." If a miner demands his wages in cash, he is

laid off the next week. The insertion of those two little words has rendered the law utterly useless. It is a real tragedy.

A courageous Indiana legislator proposes to fine a baggage-man every time he throws a piece of baggage from the car down to the platform instead of gently transferring it to a truck only a few inches lower than the bottom of the car.

The law-makers of Texas have made a bid for our foreign travel by bravely passing a resolution that the skies of Texas are bluer than those of Italy. It made no difference that perhaps none of them had visited Italy; of course everything about Texas is better than anything anywhere else, even unto the skies.

A righteous Tennessee senator would "forbid any person to linger or loiter on any street, alley, road or lane in the vicinity of any young ladies' boarding school. Neither shall any one try to communicate secretly with the inmates of such institution nor loaf, lurk and loiter where the inmates of such institution are likely to be found." The last clause is delicious.

Deponent sayeth not whether this "loaf, lurk and loiter" bill was passed, but the wicked Virginia Senate of 1898 defeated Senator McCane's anti-flirting bill by twenty-four to nine.

Rhode Island has recently gotten into a peck of trouble on social questions. One of the courts has just passed on an ambiguous law of some fifty years ago, according to which there has not been a legal marriage in that State in half a century. Every child born of parents married in Rhode Island is illegitimate and a bastard.

Down in Louisville in the winter of 1898 there was a terrible hubbub which threatened to change the whole course of politics. Some good people got after the Grand Jury about the open saloons and gambling houses. One of their members fortunately recollected a law introduced by a country member, and enacted some time previously, which

prohibited the keeping of red-birds, martins or other wild song-birds in cages, and fined offenders. Of course this had never been enforced, but there it was on the statute books. So they called the Chief of Police, Jacob Haeger, and sternly demanded to know why he had not enforced the red-bird law. Chief Haeger was new and he thought this meant business. By noon the next day, four hundred citizens had been ordered to let their red-birds go or pay the fine. The clamor became so great that it threatened to disrupt the political party who had control of the town. Its enforcement was suspended and of course those who were willing to condone the lack of enforcement of one law could not vigorously demand the enforcement of the law against faro banks, crap games, pool rooms and brothels.

In Toledo the church people thought they would catch Mayor Jones in a trap shortly after he was elected the first time. So they introduced in the council in which he had the deciding vote on that question, a resolution demanding the enforcement of the law for Sunday closing of saloons. He said he should vote for it if it was amended to read the enforcement of the law for Sunday closing of all shops or stores mentioned in the law. The proposers could not object to that, though they did not want it, and it passed. For two Sundays not only were the saloons closed as tight as a drum, but also not a street car ran, not a paper was sold, not a milk wagon dared go on its route. The law was enforced impartially and then the common council, moved by the wrath of the people, got together and repealed every Sunday ordinance they had ever passed, and Toledo has a quiet Sunday without them.

In 1896 there was a wave of legislative sentiment against tall hats in theatres. Bills were introduced in almost every State legislature and passed in New York, New Jersey, Illinois, Missouri, Nebraska and Colorado. In the latter State there is a fine of \$25 and

damages not to exceed \$60. Of course they are not enforced.

Minnesota legislators presumably duly considered the phrenology bills submitted to them by one of the honorables. One provided for a State phrenologist, with an assistant, who should examine not less than two thousand heads in a year.

In Wisconsin some barber legislator introduced an anti-whisker law so that there might be more shaving. In Illinois every barber has to pass an examination and be licensed. Of course it is a farce for getting fees into the pocket of some official.

Missouri would prevent its people from eating green watermelons by appointing a watermelon inspector and the bill was only defeated when a venerable member moved that the inspector's title should be "The Official Plugger, Muncher and Taster of the State of Missouri." Also the same legislature sent to engrossment a bill preventing card-playing on the first day of the week.

An honorable at Albany wanted to have an inspector of horse-shoeing, and another to make chiropody a profession with a license, and a third would revoke the license of teachers who used tobacco. In Massachusetts, Representative Teamoh would prohibit hens and roosters from wearing trousers. And so it goes — almost *ad libitum*, certainly *ad nauseum*.

I was brought up to reverence law, but, on looking into it, I find a great deal of it utterly unworthy of reverence and much absolutely unenforceable. The reason is that we are

afraid to elect the same man more than two terms. We give him an uncontrolled power over us, and then, feeling that he cannot stand more than a short term of such uncontrolled power, we do not keep him there. If we would take away from him this dangerous power of enacting laws, and choose legislators as counsellors or advisers to the people, then we could keep a legislator in office indefinitely. He could not become corrupted because he could not deliver the goods. The people would vote on laws. This is done in Switzerland, where the people can vote on any law passed by the legislative body. It results in laws which are noted for their scarcity, simplicity and enforceability; and in the further fact that legislators are reëlected for term after term.

This is called Direct Legislation and consists of two things. By the Referendum no law goes into effect, within a reasonable length of time, unless approved by the people. If during that time — say sixty days for State law — a minority of the voters — say five per cent — sign a petition to have it referred to the whole people, it is held over till the next election, when the people vote on it, a majority accepting or rejecting it. By the Initiative a reasonable minority of the voters can propose a law which, if not passed by the legislature, goes to a vote of the people. The two together give the people constant and firm control over their own law-making. It would do away with the legislative follies and corruptions with which this article deals, as well as many other evils.



THE FIRST TEN SECRETARIES OF STATE.

II.

BY SALLIE E. MARSHALL HARDY.

JEFFERSON appointed James Madison secretary of state. He was forty-three years old, and his eight years of service covered a troublous time for the United States.

A biographer of James Madison says truly: "Simply to be such a man as he, is to leave a benediction behind as a legacy for after years. No human position can give honor to such a man! He is himself honorable above all offices or places. He honors the highest place more than it honors him." He was a descendant of an Englishman who settled in Virginia. His mother's maiden name was Eleanor Conway. He was born March 16, 1751, in King George, Virginia, and was the eldest of seven children. He was a graduate of Princeton, and, throughout life, was fond of quoting Doctor Witherspoon, the president of the college in his school days. It is said he studied so hard as to impair his health for life, that he only allowed himself three hours' sleep each night, and studied nearly twenty-one out of the twenty-four hours.

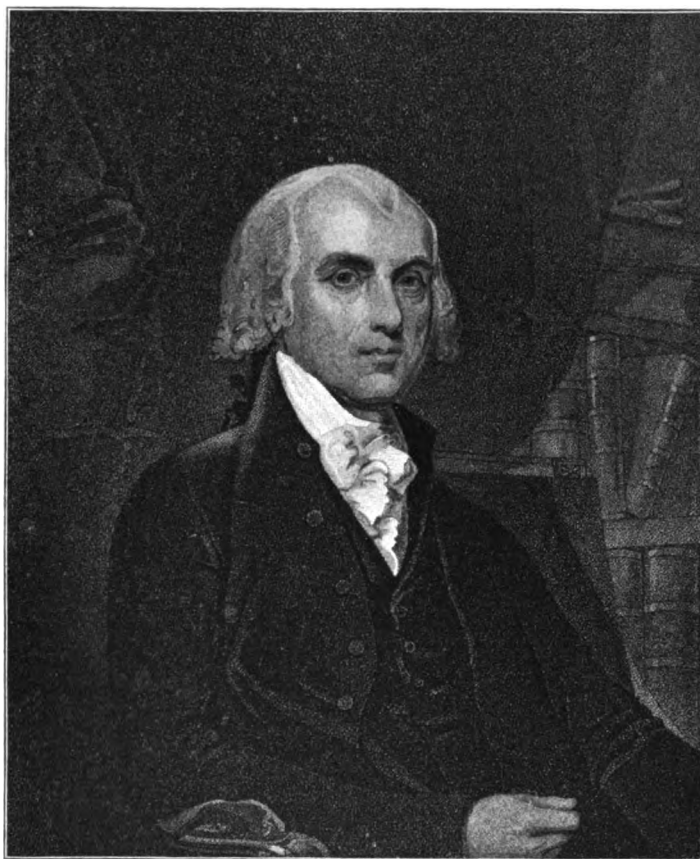
Thomas Jefferson wrote of him, "Of the power and polish of his pen and of the wisdom of his administration in the highest office of the nation, I need say nothing. They have spoken and will forever speak for themselves." Mr. Madison began but did not finish the study of law.

He served in the Virginia legislature three years, and it was through his aid that Kentucky was separated from Virginia, and made an independent State. He is said to have prepared more papers for "The Federalist" than any of his co-laborers, except Hamilton.

He became an ardent Democrat, and was a member of the First Congress. He did so much for the success of the Democratic party that, when Jefferson became president, in 1801, he made him his secretary of state.

The Rev. Mr. Weaver, in writing of the appointment, says: "Scarcely could Mr. Jefferson have made a wiser choice. Mr. Jefferson was a man of strong impulses and radical action and speech. He was liable under provocation to be an extremist. He was elected as a radical Democrat, whom the high Federalists regarded as a leveler, a Jacobin, a contemner of law and religion. Extreme feelings were in the ascendant. Mr. Madison had all along been a moderate Federalist, was a moderate man always, was profoundly respected by all parties, was one of the authors of "The Federalist," which was that party's Bible. His appointment to the first office in the cabinet was an assurance of moderation in the Democratic President, and encouraged the Federalists to hope that all was not lost. And this, which worked so well in the beginning, worked equally well through the whole administration." He held the office during Jefferson's two terms, and the time was full of importance to the United States. We had war with Tripoli, and during these years England and France both put unbearable restrictions upon our trade, and we were therefore on the eve of trouble with both those countries.

One of the most important occurrences during Madison's term as secretary, was the purchase of Louisiana from France, by the United States. In 1801, Spain ceded Louis-



JAMES MADISON.

iana to France, and at once the people of the United States made up their minds to have it. Congress appropriated the money to buy it, and Mr. Jefferson sent Mr. Monroe a special envoy to France to negotiate, with the aid of our minister there, Robert Livingston. The price paid was fifteen millions. Dr. Weaver says: "It was a peaceful purchase of an empire, as one farmer would buy a farm of another." Seven men were party to it, Jefferson, Livingston, Madison and Monroe for the United States, and Bonaparte, Talleyrand and Marbois for France. When the bargain was made, those present rose and shook hands, and Livingston said: "We have lived long, but this is the noblest work of our whole lives."

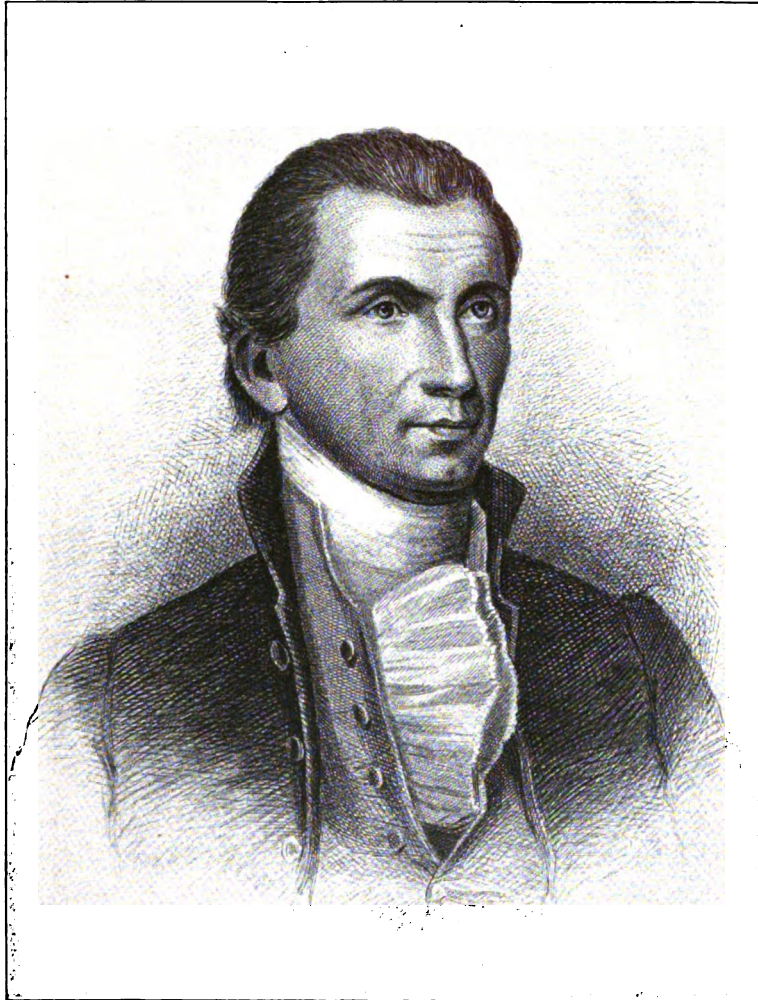
In connection with this purchase the following story is cherished in my mother's family as an interesting tradition. Her great-aunt, Elizabeth Moore, married the Marquis Barbé de Marbois, Napoleon's minister of foreign affairs, who was present when the sale was made. Napoleon turning to him whispered the amount he intended to ask of the American commissioners.

"Treble it," was the advice of the shrewd Marquis, "they will not hesitate to pay three times the sum you name." Napoleon followed his advice, and when the money was paid, he was so pleased that he gave a handsome sum from it to his clever minister. Strange to say, a part of this purchase money came back to the United States in 1853, as a bequest to the relatives of Madame de Marbois, among whom were Mr. Willing, the father of young Mrs. John Jacob Astor of New York, and Mrs. Sallie Moore Pope of Louisville, Kentucky.

Like Washington and Jefferson, Madison married a young and fascinating widow. Like them also he had an early love affair which was unfortunate. He was forty-three when he met beautiful Dolly Payne Todd. He won her hand and they were married in 1794. Although born a Quaker, she had

become a finished lady of society, and while Mr. Madison was secretary of state under Jefferson, she presided as mistress of the White House, as Jefferson was a widower. Again, when her husband was President, she dispensed the hospitality of the executive mansion; in all for sixteen years, the longest time any woman has occupied the position, and history tells, in glowing terms, how she graced it. My mother went, when a young girl, to the White House, during the administration of James K. Polk, and she has often told me of the impression made upon her by Mrs. Madison. She was then an old lady and was receiving with Mrs. Polk, seated in a large chair. Although Mrs. Polk was gracious and pleasant, charming Mrs. Madison monopolized the greater share of the attention of the visitors.

When Madison stepped from the office of secretary of state to that of President, he appointed Robert Smith of Maryland to the head of his cabinet. Mr. Smith was born in Lancaster, Pennsylvania, and was a graduate of Princeton College. He was a volunteer at the battle of Brandywine. He studied law and practiced a while in Baltimore. He was a State senator, attorney-general of the United States, and secretary of the navy before he was secretary of state. He was a descendant of John Smith, an Irishman, from Stralanel, Ireland, who came to Maryland, and was for years a prosperous merchant. Robert Smith was secretary of state from March 6, 1809 to November 25, 1811, when he determined to retire from public life, and resigned the office. Mr. Madison then urged him to go as minister to Russia, but he refused. He was honored and beloved by the people of Maryland, and all his life they proved their devotion to him in every way possible. He was chosen president of the Bible society; president of the Maryland agricultural society, and provost of the University of Maryland. During his term as secretary of state, war with England was declared.



JAMES MONROE.

When he resigned, Madison gave the place to James Monroe, who continued secretary for the remaining six years that Madison was president, when he, like so many of his predecessors, went from the cabinet to the White House. During these six years the war with England was waged, the city of Washington burned, and we invaded Canada.

James Monroe was descended from a family of Scotch Cavaliers. He attended William and Mary College, and was a member of the noted Phi Beta Kappa society, which was formed at this historical Virginia College in 1776.

He was a lieutenant at eighteen in the Third Virginia Regiment of the Revolutionary army. The regiment was commanded by Col. Thomas Marshall, the father of Chief-Justice John Marshall, and the great judge was himself also a lieutenant in it at the same time.

He studied law in Thomas Jefferson's office. He served a term in the Virginia legislature and three years in Congress. He was a member of the Virginia Convention which accepted the United States Constitution, but was opposed to it. Twenty-eight years afterwards he explained his reasons for opposing it in a letter to Andrew Jackson. He was a United States senator in 1790. He was twice elected governor of Virginia, and resigned, soon after his second election, to become secretary of state.

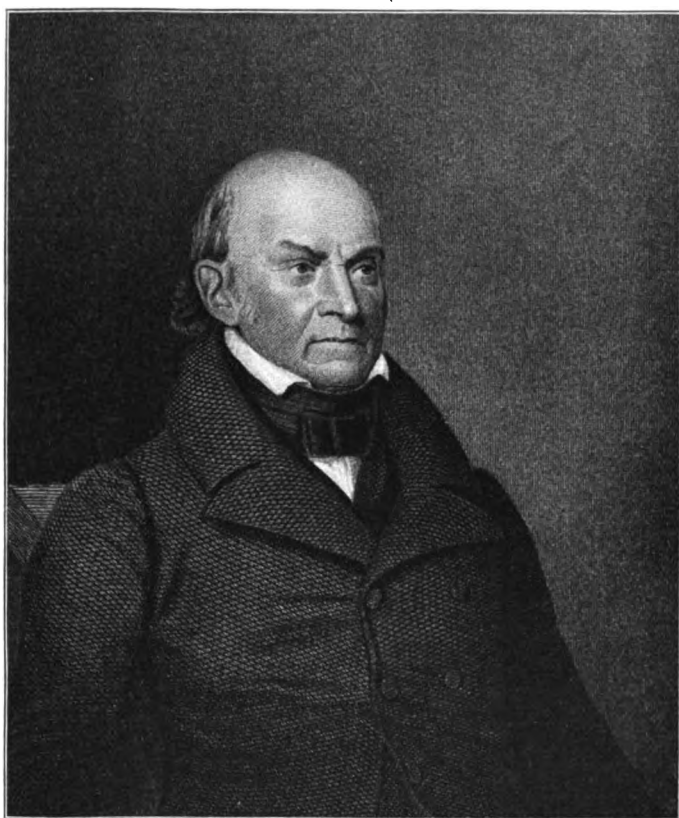
War with England was declared June 18, 1812, on account of England's interference with our commerce and treatment of our seamen. James Monroe communicated to England our declaration of war. He had not only his duties as secretary of state, but General Armstrong, the secretary of war was removed, and he had also the hard duties of that department to perform. When New Orleans was in danger, in 1814, and there was not money enough belonging to the government to defend the city, he pledged his private property and so raised

the necessary money; the British were defeated and the war brought to an end. The war ended by the treaty of Ghent and the fixing of the northern limits of the United States at Lake Huron and Lake Superior.

Mr. Monroe was fifty years old when appointed secretary. So popular was he with the people that when he offered himself the second time for President of the United States, only one vote was cast against him. While a member of Congress in New York, when twenty-eight years old, he married Eliza Kortwright, a daughter of Lawrence Kortwright, a gentleman who had lost all his fortune in the Revolution. In 1817, when he became President, he appointed John Quincy Adams secretary of state, and he held the office during Monroe's two administrations.

A biographer says, "John Quincy Adams was the product of an ancestry and period, both of which put their forces into him in strong measure." He was born July 11, 1767, in Braintree, Massachusetts, now Quincy, ten miles from Boston. He came of a genuine Puritan family. His mother was Abigail Smith, a descendant of the Quincys. He said of his name: "My great-grandfather was dying when I was baptized, and my grandmother, his daughter, requested that I might receive his name. It was the name of one passing from earth to immortality. The fact, recorded by my father at the time, has connected with that portion of my name a charm of mingled sensibility and devotion. These have been among the strongest links of my attachment to the name of Quincy, and have been to me, through life, a perpetual admonition to do nothing unworthy of it."

He went abroad with his father in 1778, and studied at the schools of Paris and Amsterdam and the University of Leyden. When twenty years old, he began to study law in the office of Theophilus Parsons, afterward chief justice of Massachusetts, at Newburyport. He opened an office in Bos-



JOHN QUINCY ADAMS.

ton in 1790. He said of his practice: "I can hardly call it practice, because for the space of one year, it would be difficult for me to name any practice which I had to do. For two years, indeed, I can recall nothing in which I was engaged that may be termed practice, though during the second year there were some symptoms that by persevering patience, practice might come in time. The third year, I continued this patience and perseverance and, having little to do, occupied my time as well as I could in the study of those laws and institutions which I have since been called to administer. At the end of the third year I had obtained something which might be called practice. The fourth year I found it swelling to such an extent that I felt no longer any concern as to my future destiny as a member of that profession. But in the midst of the fourth year by the will of the first President of the United States, with which the Senate was pleased to concur, I was selected to a station, not, perhaps, of more usefulness, but of greater consequence in the estimation of mankind, and sent from home on a mission to foreign parts."

Mr. Adams was always a great student of the Bible, and wrote a series of letters to his son on its teachings, which were published in a volume after his death.

In 1817, when Mr. Monroe made him secretary of state, he was minister to England. He returned immediately to this country. On his arrival, a great dinner was given in his honor in New York at Tammany Hall, at which Governor Clinton, the mayor of the city, and two hundred other distinguished guests were present, all uniting in praise of the great diplomat and statesman. From there he went to Boston, where another large reception was given him, at which his aged father had the pleasure of being present.

February 22, 1819, the United States bought Florida from Spain, thus securing the last of the Spanish territories which

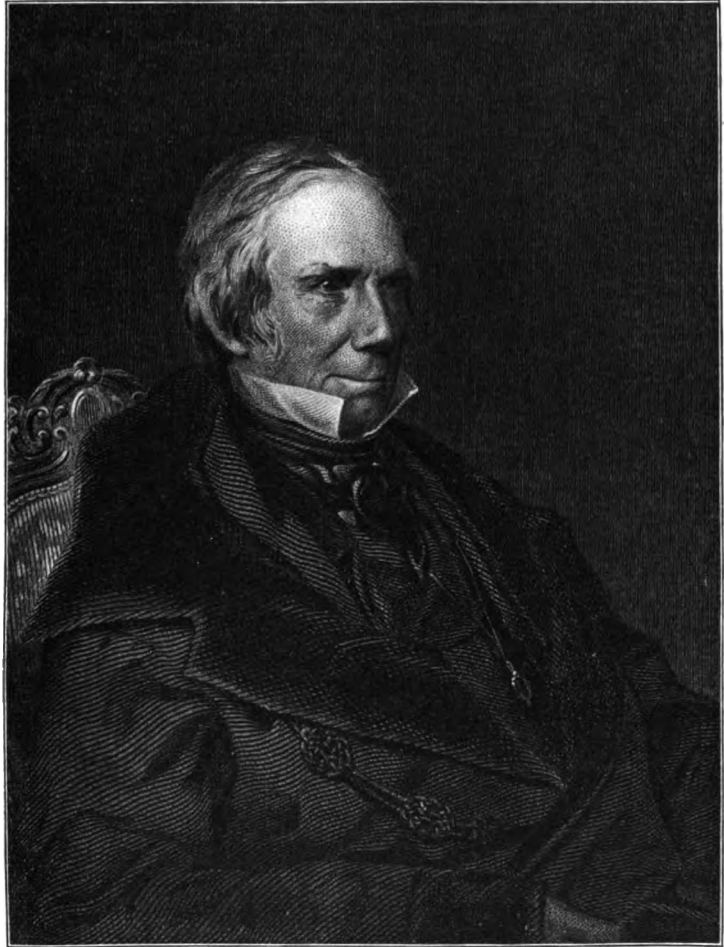
were too near to our country to safely remain the property of another.

In 1821 the Greek revolution broke out. The Greeks were subject to the cruel Ottoman power and they resisted. The American people naturally sympathized with the Greeks. Money, provisions and arms were collected all over the United States, and sent to Greece, and resolutions were passed at many public meetings. The Greeks appealed to the United States, as a government, for assistance, but Mr. Adams, true to our principles of non-interference in European affairs, wrote to the Greek minister: "But while cheering with their best wishes the cause of the Greeks, the United States are forbidden, by the duties of their situation, from taking part in the war, to which their relation is that of neutrality. At peace themselves with all the world, their established policy and the obligations of the laws of nations preclude them from becoming voluntary auxiliaries to a cause which would involve them in war."

It was during Mr. Adams's term as secretary, that President Monroe, December 2, 1823, in a message to Congress, gave utterance to the now famous American doctrine, called the Monroe doctrine, which in a nutshell is: "That we must not entangle ourselves with foreign alliances, nor permit European interference in American affairs, either in our own or other American republics."

During these years we acknowledged the independence of the South American Republics. The Seminole war came on, and General Jackson's going upon Spanish soil and hanging as spies two British subjects, might have caused war with England, but for Mr. Adams's diplomacy in convincing the British cabinet that General Jackson was right.

During the whole time he was secretary, he was followed by a bitter persecution from political enemies, his father's and his own, but when asked by his friends to defend



HENRY CLAY.

himself against their attacks, he replied: "The faithful discharge of my duty to my country is my best defense." It has been fitly said that "Adams was the thinker, Monroe the practical executive, of the administration," and that "the era of good feeling which they secured for the nation was first realized in the unity and harmony of their deliberations."

He sympathized deeply with the temperance cause and supported it by his pen and his example.

July 26, 1797, he married Louisa Catherine Johnson, daughter of Joshua Johnson, American consul at London. For fifty years they lived happily together. On the tablet to her memory in the Unitarian church of Quincy, Massachusetts, is the following beautiful inscription:—

LOUISA CATHERINE.

Living, through many vicissitudes and under many responsibilities, as a daughter, wife and mother, she proved equal to all.

Dying, she left to her family and her sex the blessed remembrance of a woman that feareth the Lord.

When John Quincy Adams ceased to be secretary and became President, he appointed Henry Clay to be the head of his cabinet. Mr. Clay was born in Hanover County, Virginia, April 12, 1777, and was the son of a Baptist clergyman. His early years were spent in poverty and toil, and his only schooling was that obtained at the old log schoolhouse near his home. When he was fifteen, he was given a clerkship in the clerk's office of the High Court of Chancery, and there attracted the notice of the great Chancellor Wythe, who took a great fancy to him, and asked Robert Brooke, then attorney-general of Virginia, to allow him to study law in his office. He came to Kentucky in 1797, and at once entered politics, and for over forty years was the idol of the Kentucky people. Even to-day no statesman, living or dead, is nearer and dearer to

the Kentucky hearts than "the Sage of Ashland," as they still fondly call him.

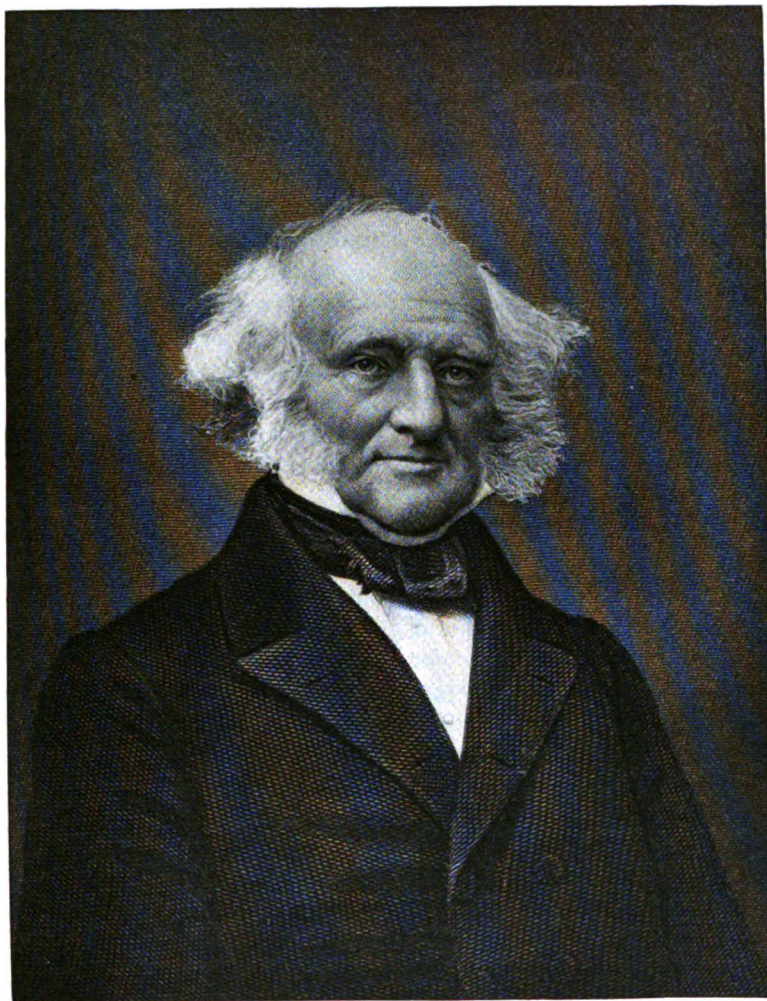
In the cemetery at Lexington, Kentucky, a lofty monument marks the place where the great "commoner" sleeps. A Virginia visitor was once being shown about Lexington and the Bluegrass region of Kentucky. When they came to the grave of Clay, the visitor expressed surprise that Mr. Clay should have been buried in Kentucky.

"And why not, pray?" was the indignant question asked by the astonished Kentuckian. "Where else would you have buried Kentucky's greatest son?" "Clay was a Virginian," said the stranger; but it was very difficult to convince his host that it was true, and he was only appeased when the visitor reminded him that when Clay was born, Virginia and Kentucky were one and the same State.

John Quincy Adams appointed him secretary of state in 1825. When Mr. Clay's own defeat for President, in 1824, had been assured, he was instrumental in the election of Mr. Adams, so when he accepted the first place in Mr. Adams's cabinet the cry of "bargain and sale" between the President and his chief secretary went up all over the country. Of course, it was not true, and to-day is told as a sample of what even the greatest men have to face when they enter political life. Perrin, a Kentucky historian, says: "Four years later, Mr. Clay was by far the strongest candidate in his party, but it was the custom, and except in the case of the elder Adams, had been observed up to this time, to elect a President to a second term as 'an endorsement of his administration,' and to this questionable custom may be attributed the substitution of Mr. Adams as a candidate in this campaign."

One of the most important things which took place while Mr. Clay was secretary, was the convention held to settle with Great Britain about indemnities.

The following humorous story was told me by an old lady, who had so much



MARTIN VAN BUREN.

curiosity to see the famous secretary of state, whose name was a synonym for all that is great and wise, in her home when she was a little girl, that she gratified it at no little cost of trouble and pain to herself. Her father had invited a party of gentlemen to play cards with Mr. Clay. The little daughter of the house, a pretty little girl, with long golden curls, had been forbidden to enter the room, in spite of her entreaties to be allowed "just to look at the big man." But she determined any way to have a sight of him, so she stole to the parlor door and peeped through the key-hole. Her long curls became fastened around the knob, and a servant, who was in the room replenishing the fire and the glasses, suddenly opening the door to come out, jerked the little one into the middle of the room by her hair. Mr. Clay quickly laying down his cards, took the little girl on his knee, soon dried her tears and told her he had never had a greater compliment than she had paid him by her great anxiety "just to look at him."

Henry Clay married Lucretia Hart, April 11, 1799. She was eighteen years old, and he was a promising young lawyer. She was the youngest daughter of Col. Thomas Hart and Susanna Gray. Her father was an officer in the revolutionary army, and one of several distinguished brothers whose descendants are now prominent men and women throughout the United States. These Hart brothers were among the proprietors of the Transylvania company, to whom the State of North Carolina granted two hundred thousand acres of land in Henderson, one of the richest counties in Kentucky, for opening the wilderness and preparing the way for civilization in that State.

The tenth secretary of state was Martin Van Buren. He was forty-seven years old when appointed by Andrew Jackson, and served two years, from 1829 to 1831. He was born December 5, 1782, in Kinderhook. His ancestors were Germans. His father was a farmer and a tavern-keeper, and he at-

tended the village schools. He first studied law in the village and then in New York, in the office of William P. Van Ness. He began practicing law in 1803 in Kinderhook, in partnership with his half-brother, James Q. Van Allen. He removed to Hudson, and his practice was large in a few years. At thirty-three years of age, he was elected attorney-general of the State of New York.

In 1829, Andrew Jackson appointed him to the first place in his cabinet. It has been said: "General Jackson claimed that 'to the victors belong the spoils,' and he removed from office everyone who had voted against Jackson. Mr. Van Buren was one with his chief; and it may, perhaps, have been as much due to him as to Jackson, that these strong partisan measures were put in force."

Mrs. Eaton, the wife of one of the President's cabinet officers, had been so much talked about that many of the prominent officials and their families would not associate with her, in spite of General Jackson's unceasing efforts to make them. When this trouble had gone on for two years, the President determined to end the matter by having the four members of his cabinet who had befriended Mrs. Eaton resign, appoint them to other places, and summarily dismiss the other four. Mr. Van Buren had no wife or daughter to influence him in the matter, so he had ever treated Mrs. Eaton with distinguished respect. This so pleased President Jackson that when he dissolved his cabinet he immediately appointed Van Buren minister to England, and it was eventually the cause of his being President. During his time as secretary a treaty with Turkey was made.

He had courtly manners and was a very handsome man. In 1806, he married Hannah Hoes. He had been in love with her for several years and was a most devoted husband for twelve years, when she died of consumption. He never married again.

WAS THE CONFEDERATE SOLDIER A REBEL?

II.

BY BUSHROD C. WASHINGTON.

JAMES MADISON, also a "Nationalist" in the convention, and later called "The Father of the Constitution," being the recognized expounder of its character and the scope of its powers, said ("Federalist," page 176): "In order to ascertain the real character of the government it may be considered in the relation of the foundation on which it is to be established; on the sources from which its ordinary powers are to be drawn; and the authority by which future changes in the government are to be introduced. On examining the first relation, it appears on the one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other hand, that this assent and ratification is to be given by the people *not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong*. The act, therefore, establishing the Constitution, will not be a *national* but a *federal* act."

Did space allow, it could be shown that the same opinions were held by nearly all the statesmen of that day, including George Washington, the first presiding officer of the convention.

It is next in order to advert to the internal evidence of the written document — the Constitution as adopted and amended.

I know of no fairer nor more thorough analysis of the Constitution than that presented by the late Hon. Alexander Stephens of Georgia, from whose works, "The War between the States," and "History of the United States," I have already made frequent extracts. While Mr. Stephens adopted the cause of his State in the Civil War, and

was chosen vice-president of the Confederacy, there never was a more ardent lover of the Union, nor one who labored more earnestly to avert the "Great Catastrophe." He separates the operations of the Constitution under two heads, — covenants between the States; — and delegations of specific powers by the States severally to the States jointly, that is, to the United States. To accept his classification will greatly facilitate our inquiry as to the nature and powers of the government.

By those who hold that the Constitution created a consolidated nation possessed of all paramount authority, much has always been made of the mere phraseology of the instrument without regard to the related facts. The preamble has been held by such, as of more value in construing the nature of the government than all the succeeding covenants, delegations and restrictions of powers. Great emphasis has been laid upon the words, "We the people," in the opening sentence which reads, "We the people of the United States, in order to form a more perfect Union, etc., do ordain and establish this Constitution for the United States of America."

In view of the formative processes of the Constitution, set forth in the synopsis already presented, it is difficult to imagine how the preamble of the Constitution could ever be construed to mean that the people of the United States, in the aggregate had *consorted* together into a nation. The last words of the paragraph, "Do ordain and establish this Constitution *for the United States*," would seem to negative such a far-fetched assumption. It is plain that "We the people etc. do ordain etc." could have no other signifi-

cance, than that of asserting that as all the powers of government being derived from the people, the States, before ratifying the Constitution, had been authorized to do so by the people of the several States in conventions assembled.

The expression was so understood at the time. The vigilant eye of Patrick Henry, who was ever on guard over American liberties, when the document was presented for ratification in the Virginia convention, immediately detected the words, "We the people," and gave warning that they would some day be used to misinterpret the nature and functions of the Constitution.

The words, "This Constitution and the laws of the United States which shall be made in pursuance thereof etc., shall be the supreme law of the land etc.," occurring in the sixth article of the Constitution, have always been a rallying point to which "Nationals" have resorted to defend their claim that all ultimate paramount authority resides in a central government.

In that war of Titans — the contest in the United States Senate, January 22, 1833, between Daniel Webster and John C. Calhoun over the nullification resolutions of South Carolina, Mr. Webster dwelt with a great emphasis upon the sporadic expressions in the preamble and sixth article. Through the sheer power of eloquence he fixed upon them a meaning and importance never before claimed or intended.

Of all the statesmen of his day, no other enjoyed the confidence of the people, North and South, to a greater degree than Daniel Webster. He was justly regarded by the people of both sections as a patriot of the highest order. To him, perhaps next to the advent of the Messiah, no other event appeared more fraught with blessings to the human race than the creation of the American Union. Embracing and safeguarding so much of human rights and civil liberties, he looked upon this fabric of the fathers with an admiration akin to that of the Evangelist

in Patmos, beholding in vision the New Jerusalem. From a heart welling with love for the Union issued the impassioned utterances of that memorable speech.

But it was vain for him to base an argument in support of centralism upon desultory expressions in the written instrument. The mighty waves of his eloquence pounded against these stubborn, immovable rocks — the facts of the Constitution's history.

To the invincible array of facts presented by Mr. Calhoun, and the deductions of his marvellous logic, Mr. Webster made no specific reply; and, while the issues of that debate have since been settled by the war as far as secession is concerned, the argument of Mr. Calhoun has never been answered by the processes of reason.

It was the misfortune of Mr. Calhoun that he applied his well-proven case of State sovereignty to the indefensible doctrine of nullification — a procedure which contemplated the right of a State to remain within the Union, in the enjoyment of its benefits and protection, while acting in defiance of its laws.

Mr. Webster subsequently receded from the extreme views uttered in this debate, and almost conceded all Mr. Calhoun had claimed as to the federal character of the Constitution and the rights of the States.

In the Supreme Court of the United States, in the case of *Bank of Augusta v. Earl* (13 Peters' Reports, p. 559), he said: "The Constitution treats States as States, and the United States as the United States, and by a careful enumeration, declares all the powers that are granted to the United States, and all the rest are reserved to the States"; and again, "the States of the Union, as States, are subject to all the sovereignty and customary law of nations."

In his speech at Capon Springs, Virginia, June 28, 1851, replying to a toast, "The Union and the States," he said: "How absurd it is to suppose that when different parties enter into a compact for certain pur-

poses, either can disregard any one provision, and expect, nevertheless, the others to observe the rest! I intend for one, to regard and maintain, and carry out to the fullest extent, the Constitution of the United States, which I have sworn to support *in all its parts, and all its provisions*. It is written in the Constitution: 'No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, *but shall be delivered up* on claim of the party to whom such service or labor may be due.' That is as much a part of the Constitution as any other. . . . I have not hesitated to say, and I repeat, that if the Northern States refuse willfully and deliberately to carry into effect that part of the Constitution, and Congress provide no remedy, *the South would no longer be bound to observe the compact*. A bargain cannot be broken on one side and bind the other side. I say to you, gentlemen in Virginia, as I said on the shores of Lake Erie and in the city of Boston . . . that you of the South have as much right to receive your fugitive slaves as the North has to any of its privileges of navigation and commerce."¹

Mr. Webster, in the eighteen years since his speech on the Calhoun resolutions, had become better acquainted with the Constitution, and was too great and broadened a statesman to be enslaved by any erroneous preconceptions of it.

It has been shown that the separate colonies, as such, united in a war for independence and entered into a confederation — "a league of friendship" — by separate sovereignties, and later into a closer Union, by the adoption of a new Constitution; that the Constitution was a compact between the same sovereign States, in which certain definite and limited powers were granted to the government created by it; that all powers not delegated were reserved to the States;

¹ From a pamphlet copy quoted by Stephens.

that in ratifying conventions, several States, notably New York, Rhode Island, and Virginia, declared the right to withdraw from the compact, should it appear necessary for the happiness of the people, of which each State, being sovereign, was the only judge; that all the States understood that all undelegated powers were reserved to and vested in themselves severally. This reservation is secured in the tenth amendment of the Constitution, which says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

These facts in our government history are, in the language of Alexander Stephens, "the deep footprints of truth impressed upon the lower strata of our political foundation and growth, and must stand forever against bare assertion and speculative theory. They are marks which discussion cannot obliterate, argument cannot remove, sophistry cannot obscure, time cannot erase, and which even wars cannot destroy. . . . They will stick to the very fragments of the rocks of our primitive formation, and bear unerring testimony to the ages to come of the true character of our institutions."

As the proverb goes, "There is a skeleton in every house." This wondrous fabric of the fathers was not an exception. There was a skeleton locked in the closet of the Constitution. It was not the result of accident or oversight. It was deliberately *placed there*, with the forethought, knowledge, and consent of the builders, no one protesting, — *the skeleton was slavery*.

In the fourth article of the Constitution it was provided that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, *but shall be delivered up* on claim of the party to whom such *service or labor may be due*."

Slavery, the enforced servitude of the

negro, was a social institution of the colonies before the Revolution, and at the time of the adoption of the Constitution, while it was general through the States, its stronghold was in the States of the South, where the climate and products rendered it most profitable. The traffic in negroes, however, called the slave trade, was carried on almost exclusively by the maritime States of the North, and was continued by some of them after they had become free States. The trade added largely to the wealth of those States, connected as it was with the manufacture of rum, which was shipped to Africa in exchange for negroes. It is said, when negroes were scarce and held high, the agents were instructed to "water the rum and give short measure."

This traffic in slaves was practiced by nearly all civilized nations, and was a source of wealth to Great Britain, who fastened it upon the American colonies. The ethnological status of the negro, compared with others of the human family, was so low, and his nature in an unenlightened state so servile (he being often found enslaved to his own race), that he was not regarded as having any rights that civilized people were bound to respect. He was purchased and sold as an animal of labor by nearly all nations. His condition was so greatly ameliorated by mild servitude in this country, and his character so improved under its restraints, that slavery did not offend the consciences of our forefathers a hundred years ago. But the mind of Christendom in the fifty years next following experienced material changes.

The point is made in his "Reminiscences," by the venerable Richard Wilmer, Bishop of Alabama, which I repeat from memory, that "under the fostering, uplifting influences of Southern slavery, the negroes at the close of the War were found in the estimation of northern statesmen prepared for full American citizenship, and were invested

with it, an elevation denied to the ever free Indian."

This is sufficient answer to those who hold that slavery degraded the negro. It received him a savage,—it delivered him an American citizen.

The institution of slavery, opposed as it was to the spirit of the age, even had it survived the War, could not have lived much longer into the nineteenth century.

But slavery as related to the Constitution only, and not to morals, herein concerns us. The anti-slavery sentiment in the North was indulged by some to the degree of fanaticism. Uninformed of the institution except through unfriendly and sensational sources, the better judgment of many surrendered to morbid sentiment concerning it. A propaganda was organized whose purpose was to limit and finally abolish slavery as an American institution. Professing to be moved by a "quickened conscience" owing allegiance to a "higher law" than the American Constitution, they declared that sacred compact, in sanctioning and providing for slavery, to be "a league with death and a covenant with hell."

This abolition propaganda soon began to influence legislation, both State and national. In Congress its efforts were bent to prevent the extension of slavery to the territories, notwithstanding the territories were the common property of the country.

A number of the New England States also *deliberately nullified the Constitution* as to the clause in the fourth article, which required the rendition of fugitive slaves. This was done by enactments called "Personal Liberty Bills," which made it a criminal offense for anyone within those States to arrest and return a fugitive slave to his master. The effect was that a slave escaping into any of these States became lost property to the owner.

Both the restrictive legislation of Congress and those personal liberty bills were

opposed to the letter and spirit of the Constitution. It is not practicable to refer to the Missouri Compromise and the Kansas and Nebraska Bills. All that legislation in Congress affecting the limitations of slavery in the territories, as well as the compromises agreed to by the Southern States, was declared by the Supreme Court of the United States to be entirely outside the delegated powers of Congress, and palpably unconstitutional. This was set forth in an opinion of the court by Chief Justice Taney in the famous Dred Scott decision. That masterful deliverance, familiar to the legal profession, containing as it does so much constitutional adjudication upon questions which once divided the country, should be familiar to every intelligent American. It held "that a slave was property recognized by the Constitution; that the territories acquired by treaty or conquest were the property in common of all the people, and were held by the government as their agent. . . ." "That Congress have no right to prohibit the citizens of any particular State or States from taking up their home there, while it permits citizens of other States to do so; and that every citizen has a right to take with him into the territory any article of property which the Constitution recognizes as property. The act of Congress, therefore, prohibiting a citizen of the United States from taking with him his slaves when he removes to the territory in question to reside, is an exercise of authority over private property which is not warranted by the Constitution" (19 Howard's Reports, page 395).

The relations between North and South, growing out of the territorial question, and the civil liberty bills, became strained to the utmost tension. In the presidential campaign of 1860, a party whose political tenets were hostile to the constitutional claims of the South elected a President of the United States upon a platform pledged to exclude slave property from the territories. Mr. Lincoln announced in his campaign, and doubtless

believed, that the "Union could not long exist half free and half slave."

Having exhausted every means consistent with honor and self-respect to secure their constitutional rights and the happiness of the people in the Union, in the judgment of some of the southern States the time had come when it was necessary to withdraw from it. The Union as established by the fathers was dear to the South. Their inheritance in it had been purchased by the blood and sacrifice of their forefathers, their soldiers and statesmen in every generation had contributed to its greatness and glory.

Slavery, representing as it did two billions of property, and interwrought as it was into southern sociology, was as nothing to them as compared with the benefits of the Union. But their rights in the Union having been nullified they could see no future in it but subservience to an oppressive majority. There was nothing left but to fall back upon those inherent sovereign rights which as States they had ever possessed, which they proclaimed upon entering the Union, of which they had never divested themselves, and from which they could not alienate their people.

It is a popular misconception that the southern States claimed the right of secession under the Constitution. It was never so claimed. It was a *reserved right*, understood by the States as has been shown, and by none more emphatically asserted than by Connecticut, Rhode Island and Massachusetts. It was considered the only peaceable escape from oppression under the compact. This was set forth by the famous Hartford convention of 1814, in which were represented the States of Massachusetts, Rhode Island and Connecticut; Vermont and New Hampshire being also irregularly represented. It was convened to consider their grievances connected with the war with Great Britain. They declared, "If the Union be destined to dissolution by reason of the multiplied abuses of bad administration, it

should, if possible, be the work of peaceable times and deliberate consent. . . . Events may prove that the causes of our calamities are deep and permanent. . . . Whenever it shall appear that the causes are radical and permanent, a separation by equitable arrangement will be preferable to an alliance among nominal friends, but real enemies."

The legislature of Massachusetts in 1844-45, remonstrating against the annexation of Texas, resolved "That the Commonwealth of Massachusetts, faithful to the compact between the people of the United States, according to the plain meaning and intent in which it was understood by them, is sincerely anxious for its preservation; but that it is determined, as it doubts not other States are, *to submit to undelegated powers in no body of men on earth*"; and that "The project for the annexation of Texas, unless arrested, *may tend to drive these States into a dissolution of the Union.*"

Further proof that the abstract right of a State to secede was recognized by northern as well as southern States is hardly needed.

Acting upon this right, for causes deemed sufficient, South Carolina left the Union, other States soon following. The procedure was orderly and deliberate. The withdrawal of these States from the Union was in the same manner and by the same authority as that by which they had entered it, to wit: — by authority of the people, through ordinances enacted by their delegates in State conventions assembled. They later united under the Southern Confederacy.

There was no rebellion in this procedure. The right to withdraw being admitted, there was no authority in the general government to prevent it. It is a self-evident proposition, that there is no authority to prevent an act which the party enacting of right may perform. The Constitution will be searched in vain to find in it, expressed or implied, the right to coerce a seceded State.

The proclamation of President Lincoln, of April 15, 1861, calling out seventy-five thousand militia to coerce the seceded States, was

an unauthorized, extra-constitutional act of the Executive. It is true Mr. Lincoln invoked the Constitution, but he could not and did not recite the article of that instrument containing his authority, nor specify the breaches of it on the part of the seceded States.

That there was not in Mr. Lincoln's mind, from his peculiar standpoint and view of the confronting circumstances, justifying cause for his action, the writer is not prepared to deny. That Mr. Lincoln was a patriot even those who once held him an enemy must admit. He was elected President of the United States, and coming into office found the Union crumbling to pieces under his feet. There was no time, in his opinion, for constitutional niceties. He *felt* what Andrew Jackson had once uttered, "The Union must and shall be preserved." He would save the physical structure and the Constitution would have to take care of itself. If the Constitution did not contain sufficient authority to preserve the Union, it ought to contain it, and he would assume it did. His authority for coercion was not in the Constitution. Believing the life of the Union at stake, he deemed his authority sufficient in that paramount law — the law of self-preservation.

The same law of self-preservation had impelled the southern States to exercise the extremest of their reserved and sovereign rights and withdraw from the Union. Secession and coercion were both extreme and extra-constitutional measures.

Upon the call for seventy-five thousand troops to march against the seceded States, the remaining slave States, which had hesitated with the hope to intervene for peace, quickly seceded and cast in their lot with the southern Confederacy.

The citizen of the Southern States did not hesitate a moment as to where his allegiance belonged. He did not consult Vattel, Burlamaqui, DeTocqueville, nor any authority upon political science. The instincts of nature in such an emergency were a sufficient guide. His allegiance to his

State was determined by the same intuition by which a man will defend with his life the mother who bore him, or perish to protect the honor of his family.

Compared with his State the Union was but a conventional government, possessed of nothing, either of territory or power, which had not come to it from the States.

The Constitution having been voted a dead letter, there was nothing left to him of republican liberty but that to be found within his commonwealth. The federal government as compared with his State was distant and shadowy. He was hardly conscious of it except in presidential years, on the Fourth of July, or when paying postage and internal revenue.

But the lines of his life were in constant contact with his State. In it he lived, moved, and had his civil and political being. Its authority and protection were over and around him from the cradle to the grave. It contained his home and family altar.

Had he taken arms against his State, he would indeed have been a most unnatural parricide and *rebel*.

But it was not written that the American Union — the brightest star — should fall from the galaxy of nations.

With slavery and fanaticism cast out, the Union lives on under the hand of God to fulfill His great appointment.

It does not stand, however, upon the uneven pillars of loyalist and repentant rebels. The Confederate soldier is loyal but not repentant. Both history and his conscience acquit him of having sinned against the Constitution. *He was therefore no rebel*. Should he smite upon his breast and cry *peccavi*, he would be a canting hypocrite or a drivelling imbecile.

While loyal to his country, he retains his self-respect. He will meet in reunion surviving comrades, and strew flowers upon the graves of his dead. He will build homes for his aged and disabled, and rear monuments to his statesmen and heroes. He will preserve the traditions of the South-land. He will turn from these tender engagements at the call of his country, and pour out his life's blood in its defense, and even in its questionable aggressions.

Taking the northern brother by the hand, he can say, "Did you fight to save the territorial integrity, — the body of this Union, — I fought for the life, the spirit of the Constitution. We will maintain them both forever, and together will revive the spirit of those times when South Carolina rushed to the aid of Boston; when Virginia resented the wrongs of Rhode Island, and in sympathy with the sister commonwealth of Massachusetts called her people to humiliation, fasting and prayer."



TO A SPIDER.

(IN ADVERSE POSSESSION OF A CORNER OF MY OFFICE WINDOW.)

BY R. W. TAFT AND W. H. BLISS.

THOU villain that, with fraudulent intent,
Hast long aspired adversely to obtain
Prescriptive title unto my domain,
Against my right, my will, and my consent,—
Take heed of grim disaster imminent!
Thy presence irks me, and thy time is run,
And, ere the setting of yon vernal sun,
Will I eject thee from my tenement.

But, hold! On second thought thou shalt not go.
Thou art attorney to the droning flies:
Dost thou not suck them dry—yea, even so
As we our biped clients—and thyself
Wax fat upon their hardly-gotten pelf?
Remain, co-champion in high emprise!



WILLIAM CAMPBELL PRESTON.

V.

BY WALTER L. MILLER OF THE SOUTH CAROLINA BAR.

I HAVE always been under the impression that Mr. Preston's oratory was characterized by beauty of diction, charm of style and gracefulness of delivery; and I was, therefore, somewhat surprised to find Governor Perry criticising his gestures as awkward. In his "Reminiscences," he says: "I have heard Colonel Preston before popular assemblies, at the bar and in the legislature, and I have never heard him on any occasion when he did not let fall from his lips some of the prettiest expressions and most heart-stirring words ever uttered by a public speaker. His style was always fervid and rhetorical. His gestures, however, did not strike me as being graceful or studied, whilst I could not divest myself of the idea that his language was studied, and did not flow from the inspiration of the moment. It was too ornate to be natural, whilst I thought his gestures were too awkward to be studied. It might have been said of him that he was a man of nature and art. He had the kindred blood of Patrick Henry coursing through his veins and the kindred eloquence of this great Virginia orator flowing from his lips." Most writers, however, speak of Preston as graceful.

And now, in order that the reader may have as full, clear, and correct an estimate of Mr. Preston as possible, I will present some extracts giving the opinions of people who knew him, heard him speak, and were familiar with the leading facts of his life.

Says Mr. Magoon: "From his place in the Senate, he poured molten gold into the crucible of politics, with gems gathered from every glittering grotto and fragrance distilled from every blooming field, and lo,

there issued from the fusion, many substantial and splendid formulas, besides much excellence that was palpable only to the most delicate sense. But the best strength of this enthusiastic patriot is never taxed to the utmost except when he feels that real and fearful dangers threaten the welfare of his own State or the Union at large. He loves his country deeply, passionately, and we sincerely believe that no man is more willing to make greater sacrifices for the general weal, or more competent to promote it. Few excel him in gentler strains, 'the sway of social, sovereign peace'; but absolutely none like him can effectively command that more fiery eloquence that rings on the startled world like a clarion, and is 'swift, in diverse use, as is a warrior's spear.' He then breathes all the firm resoluteness of the martial-god, while 'his red shield drips before him.'"

Governor Perry took an active and prominent part in public life before the war and was familiar with our leading politicians, lawyers, and statesmen of that period. He speaks of Preston as follows: "There have been few public men who possessed such a combination of high endowments, noble qualities, and rare accomplishments as Colonel William Campbell Preston. He was one of nature's noblemen, in person, head, and heart. His figure was striking and commanding. He was tall and well-proportioned in his person. His manners were high-bred and courtly. In heart he was kind, generous, and affectionate. His character, in public and private, was pure and spotless. His intellectual qualities were brilliant and dazzling. He was a finished scholar, an

accomplished orator, and wise statesman. Many of his bursts of eloquence in the legislature of South Carolina, and in the American Senate, and before popular assemblies, are equal to those of Burke and Chatham."

Judge O'Neill speaks of him as president of the South Carolina College as follows: "He entered upon the duties of his office in January, 1846, with great *éclat* and universal confidence. The college sprang forward from its lethargy; its walls were crowded with students. The president was known to be an extraordinary man. All who could receive the benefit of his instruction were eager to do so. Many a young man, as in the days of Dr. Maxcy, caught the enthusiasm of their gifted instructor. Eloquence was no longer regarded as not worthy of note or pursuit. The young learned to speak from the daily example of the first of orators. That he was able and capable to teach clearly and satisfactorily the subjects committed to his chair, is fully shown in Dr. Laborde's history of the college."

Of his record as United States senator, O'Neill says: "In 1836 he was elected to the Senate of the United States, where he further distinguished himself as an orator and statesman."

Dr. Laborde says: "Mr. Preston is justly entitled to a place in the first rank of speakers, rhetoricians, declaimers, or orators—call it by what term we may—of his times. I care not which may be selected. He was the contemporary of McDuffie, Hamilton, Hayne, Legare, Harper, Turnbull, and others of that brilliant galaxy which, at the most eventful period of the history of our State, shed such a flood of glory upon her. Need I say that he was brought into immediate comparison with them; that they labored together on our most momentous occasions, and that the united voice of the hearers pronounced him the equal of any. . . . Sagacious in counsel, his opinions always received the highest consideration from the great men with whom

he was associated, and none commanded a greater influence. As a popular speaker he was unequalled, unless it be by McDuffie." In another place, the same writer speaks of him as "one whose earthly career had been brilliant and illustrious. There were none of his great compeers who in burning eloquence, refined and cultivated taste, and chaste and elegant diction, could claim superiority."

"The South Carolinian," edited by Franklin Gilliard, in announcing his death, said: "As to his personal accomplishments, we can but briefly allude to the rare gift of eloquence which hereditarily belongs to his family. As the Cicero of the American Senate, Mr. Preston long adorned its halls of legislation, as well as those of justice in his adopted State. In her troublous times he was prominent in her councils and identified with her great struggle, when the persuasive eloquence of Hayne, and the Demosthenean ability of McDuffie, the earnest patriotism of Hamilton, and the solid force of Turnbull, were united with the genius and learning of Harper, in their efforts for her weal. His social qualities were of the highest order, and his conversational powers rarely if ever equalled. He has passed through life with eminent distinction, and his death has been that of a warrior who has fought the good fight, and gained the victory. He leaves the name of a patriot, a gentleman, and a Christian."

The "Charleston Courier," in its editorial columns of May 24, 1860, says: "His heart, indeed, was as large, morally speaking, as his brain, and he loved his friends as few men ever loved. He deserved their love, which he in return received, and no man was more gifted in the arts and graces which adorn conversation, or was more ready to pour out his services for his friends in social entertainment. . . . As an orator, the gifts, resources, and accomplishments of William C. Preston can never be fully appreciated or estimated but by those who heard him. No

analysis or description can do justice to them. A face of large and expressive features, a commanding figure, and great versatility and flexibility of facial, manual and bodily gesture and expression—these were elements of his native endowments. To these add the largest and most varied culture, and the most devoted and industrious application, and improvement of natural powers: a diligent study of the best models and indefatigable preparation—we may have some explanation of his success. . . . The mortal remains of the last and greatest of the orators of Carolina's glorious constellation of the great debates of 1828–32, will be committed to the tomb this day, at Columbia."

I can only quote a few of the many beautiful things said of him at the bar meeting in Charleston. Hon. James L. Petigru said: "While the court was in session the news reached us that William Campbell Preston, formerly eminent among the lawyers of South Carolina, which was one of the least of his titles to distinction—the accomplished statesman and unrivalled orator had paid the debt of nature. The charms of his conversation and the splendor of his eloquence will hereafter live in memory only. Though he had long withdrawn from the public eye, and the activity of his genius had bowed to the painful inroads of physical suffering, he was followed to the last by the admiration of the public, who gazed upon him as a venerable ruin, and cherished with all the warmth of affection by a widely extended circle of devoted friends. . . . The memory of such a man should not be suffered to pass away without a fitting memorial. Nor to the bar, above all others, should the example of his life be lost; for he elevated the profession by the noble sentiments which he carried into his practice. His genius reflected honor on the land of his birth; and this State, which was the home of his choice, has reason to be proud of that distinction. His name will be inscribed on the archives of our country as a

senator who adorned the halls of Congress by his wisdom and eloquence. As a scholar, who presided with grace and dignity in the halls of learning, the students of the South Carolina College will be proud of his name, as an ornament of that institution, and the bar of South Carolina will continue for many a day to excite the emulation of the young by the example of his fame."

Henry A. DeSaussure, Esq., said: "In all the positions of life—as a jurist, as a gentleman in the private relations of life, as a politician, as a Christian—I can bear unequivocal testimony to his preëminence in every department."

Chancellor B. F. Dunkin said: "He was by far the most gifted natural orator to whose eloquence I have ever listened, and it was my good fortune to hear Legare in his speech on the resolutions of 1828, and Mr. Calhoun in the debate in the Senate on the Oregon Bill, and Mr. Preston stood head and shoulders taller than the giants who surrounded him. Other men may have attained greater distinction in particular departments, but it was his great happiness to combine in his character at one time all the qualities which give eminence to man. In his youth, I remember, he was the cherished companion of his associates,—Govan, Legare, O'Neill, and others; and when afterwards he took part in affairs of life, who wiser in council, who so able in debate in vindicating the rights of this country? And when no longer in the councils of the nation, he returned to no inglorious ease, but to teach the youth of the State to imitate his own high example."

Mr. C. E. B. Flagg paid to him the following tribute: "Great and widely spread as was the fame of the able jurist, brilliant advocate, honored senator, orator without a rival, and venerated citizen, there was a more enviable, a higher, position in reserve for him,—one more dear to the heart of that illustrious man than all the fame which he had justly won: it was the crowning

glory of his useful life, the last but not the least important link in the long chain of his clear title to fame. When the shadows of evening were gathering around him, the State reposed the highest confidence in him, and made 'the old man eloquent' the teacher of youth, the guardian of her sons."

The last lawyer who spoke on that occasion was George S. Bryan, Esq., and his tribute was perhaps the most beautiful of all. Mr. Bryan said: "It was my privilege to witness his triumphs in the scenes of his proudest triumphs. In the great senatorial struggles with Webster and Clay, and Forsyth and Calhoun, and Benton and Southard, and Wright and Everett, and Frelinghuysen and Leigh, and Rives and Crittenden, I saw him stand a peer in that great company. I have witnessed his triumphs where he stood peerless in the great assemblages of the people. There his exuberant genius, the abundance and overflow of his triumphant rhetoric, left him without a peer. In that field he had no rival. In the language of his illustrious friend, Legare, 'he was the greatest declaimer in the world.'

"There, when in full career, he seemed to riot in the inexhaustible fullness of his imagination, and to be swept by a hurrying tide of thronging fancies; then, in the unchecked flow and overflow of his genius, I think not Clay nor Webster, nor Legare nor McDuffie, were his companions. He was like some mighty tree of the tropics, whose stem reaches to the sky, yet beautiful and glorious, and fragrant with the beauty and odors of thousands upon thousands of countless blossoms. His mind was steeped in beauty, and, in its most lawless flight, never escaped from its law; graceful ever in its action, even when, with the wantonness and destructiveness of the lightning, it carried death in its nimble and flashing play; as spontaneous and abundant as when, in some rich savanna, smitten by the breath of spring, from the heated soil, as it were in a mo-

ment, start armies of vines and shrubs and flowers of every hue, in gay variety and prodigal profusion.

"But, above all, we shall do ourselves, as him, justice, to remember and dwell upon his fidelity, — the chiefest, the most costly, the most precious lesson of his life. Truth, the source of that great eloquence we admire so much, sensibility based upon truth, he sacrificed everything for it, and yet felt he had made no sacrifice. He died in the faith that he lived. It was his privilege, it was his distinction, to suffer, — no, not to suffer, but to triumph, in truth, and with her as a companion to go down rejoicing in the field that was lost!"

It has never seemed to me that Mr. Preston has been credited with that wise and far-seeing statesmanship to which he was justly entitled. His literary talents and his magnificent oratory have so absorbed and engaged our attention that we have lost sight of the fact that he was an able statesman. His course in the Senate, his positions on public matters, and the speeches which he made, give evidence of a high degree of statesmanship. Take, for instance, his position on the abolition question. Long before it had become prominent as an issue, when it was not feared at all by his associates, and when he himself was looked upon as foolish and childish for saying what he did about it, he predicted that it would grow fast if not checked in its incipency; that it would soon become one of the absorbing issues; and, unless in some way restrained, would rend the Union asunder. Events turned out just as he predicted. Reading his speech in the light of after events, we are impressed with the fact that, like his great colleague, Mr. Calhoun, in addition to his many other endowments, he had in a high degree the gift of prophecy.

On another important public question he was in advance of his people, and more democratic than Mr. Calhoun. We find that he advocated the election of President

and Vice-President by the people. Previous to that time the electors for these offices had been selected by the legislature. Mr. Preston contended that the law ought to be changed and made as it is at present, where the people themselves vote for the electors.

Mr. Preston was a Whig in politics, and was at first a believer in nullification. On this latter question he modified his views very materially. He was a strong Union man, and as he grew older the more decided and out-spoken did he become against nullification and secession ideas. Major James McD. Carrington, a member of the Washington City bar, and a nephew of Mr. Preston, writes: "I heard some expression from him myself of his intense devotion to the Union, and I have heard it said that he stated publicly in your State, shortly before his death, that he knew of no conceivable circumstances which could induce him to vote for a dissolution of the Union. If war must come, he advocated revolution rather than secession; in other words, it must be fought in the Union. But I suppose there are old citizens in South Carolina who remember his sentiments upon this subject."

Says Governor Perry: "He was a warm partisan in politics, and a fierce Nullifier in the beginning of his political career. But he died a most devoted Union man. He had seen the folly of nullification, and he was opposed to secession. He began to reflect, in the latter part of his life, on the effects of disunion, and he foresaw the dreadful consequences of an attempt to break up a great and powerful government like that of the American Republic. His hope was, just before his death, that his own dear Virginia would, like a great seventy-four-gun ship, throw herself across the stream of disunion and stop the tide of disaffection which was rolling on from the South."

But the fates had ordained it otherwise. South Carolina seceded, and her sister southern States followed in her footsteps. The war came, and the flower of southern

chivalry fell on the field of battle, wasted away on the desolate march, and drooped and died in northern prisons.

Virginia was Mr. Preston's native State, and he loved her devotedly. Says Major Carrington: "It was his custom, during the period I speak of, to spend his winters in Columbia, and spend the rest of the year at the residence of my mother, in Charlottesville, Virginia. Her home was near the University of Virginia, and she was his elder sister, and these two things made her home a very attractive place to him. He made himself exceedingly popular with the professors of the University of Virginia, and appeared to fascinate the students, who crowded about him in numbers whenever an opportunity was offered."

Mr. Preston was always popular with young men, and more especially still was he a favorite of young ladies, and he reciprocated their appreciation and affection in full measure.

In speaking of his stay at the University of Edinburgh, and of the impression which he made there, Mr. Carrington says: "It is a tradition that the professors of this institution, as well as Sir Walter Scott, with whom he had the honor of becoming quite intimate, prophesied his success and brilliant career in this country."

Mr. Preston knew Mr. Webster well, and, during the latter's stay in Columbia, had the pleasure of entertaining him at his home. While there as the guest of Mr. Preston, the students of the South Carolina College serenaded him and called for a speech. Governor Perry tells us that Mr. Webster's speech on that occasion was very brief and hardly respectful to the students. On the next day there was a large gathering of professors, students and distinguished men in the college chapel, where Mr. Webster spoke again. Here I will quote from Governor Perry: "Governor Adams and myself, as trustees of the college, were sent to escort Mr. Webster and Colonel Preston to the

chapel. As we were going over to the chapel, some one remarked that Webster ought to manifest more feeling and cordiality towards the students than he had done the evening before. Colonel Preston touched his own breast and said, 'I am afraid he is wanting in heart.' The speech was again a failure. I thought Colonel James Farrow, the student who addressed him on the part of the college, made the happier effort of the two. During the whole of Webster's stay in Columbia, I heard him but once at all interested and animated in conversation or speaking. The large dinner party given him by Governor Johnson, as Governor of the State, was a very dull affair. He seemed determined not to be roused up in conversation or speaking. But he had been in Charleston the week before, where he had been feasted till he was broken down. His conversation, however, at Dr. Gibbes's was charming and brilliant."

As I have already said, Mr. Preston was full of humor and liked to get off pretty sayings. On one occasion he met General Winfield Scott, and during the course of the conversation there was some jesting as to their respective ages. General Scott contended that they were both about the same age. After some playful bantering, Mr. Preston told the general that when he was a boy he always thought that General Scott was one of the characters referred to in "Plutarch's Lives." The remark was so happily made and so complimentary in character that General Scott at once yielded the point in dispute without further contention.

Colonel John S. Preston was a brother of Mr. Preston. He also was a splendid orator. He was a man of fine personal appearance—tall, robust and commanding. He had a great deal of dignity, and was more aristocratic in his style and demeanor, and, consequently, was not so generally popular as the subject of this sketch.

Did Mr. Preston act wisely in accepting the presidency of the South Carolina College?

I am disposed to answer in the affirmative. It is true it involved a radical change in his habits and mode of life. It took him out of politics and from the active duties of a lawyer's life, and put him to teaching and to managing young men. But there was but little chance for him politically any way. He was on the unpopular side of the leading political issues. And then his law practice had been scattered to the four winds by his absence from home and by the demands of official life. He would have had to have gone to work and built up a practice largely from the ground. For a man of his age, then, that was no easy task, and besides it was very disheartening. Old men do not like to have to wrestle in the court room with ambitious, energetic, and rising young men. And the same is true in politics. After a man reaches a certain age and gains some reputation, he prefers to lead a more quiet life—he wants to get away from turmoil and strife—he longs for placid waters rather than the tempestuous sea. And then, too, I think it was a fine thing for the college. They secured the services of an accomplished scholar,—one who had had a wide experience,—one who had not only been well educated, but who was widely read and had travelled extensively. It would have taken a long day's journey for the college authorities to have found Mr. Preston's equal. There are two ways of training men for college professors. One is to put a young man in the school-room after he has graduated, and let him learn by experience. This is the more usual and popular plan. The other is to import your teacher from other professions and from the public walks of life. In this latter way the college gets new blood, so to speak,—receives an impetus from abroad and feels the elbow-touch of the outside world. It infuses a business-like spirit into the teaching force. It keeps the college from becoming too theoretical, impractical, and cranky in its tone and spirit. It instils among the pupils a knowledge of

human nature and practical ideas of life. It is well to unite the two methods. By combining the two plans we obtain the highest degree of perfection. And then, besides, in Mr. Preston's case, the college was a gainer in another way, and a very important one at that. It received the advantage of the prestige which Mr. Preston had attained, and which he brought to it. In this respect it gained more than he did. He was greater than the college. I know that is saying a great deal, but I think it is in line with the truth. His reputation brought to Columbia, to be educated, young men from all parts of the country. It swelled the roll more than had ever been the case before. Even Mr. Calhoun, who had to some extent resented his colleague's political independence, felt prevailed upon to avail himself of Mr. Preston's influence and power as a teacher, and so we find him too becoming a patron of the college. And then there was another advantage to be derived from placing Mr. Preston at the head of the college. It enabled South Carolina in some measure to reward a faithful son. I have said elsewhere that South Carolinians were too intolerant before the war. I did not mean to intimate that they were more so than the people of sister States. Possibly they were not. It is always the tendency of majorities to become overbearing, and at the time of which we are writing the majority in Carolina was pretty large. A pressure had been brought to bear, and Mr. Preston had felt compelled to resign his seat in the Senate, and now that he was out of the way politically, it was a happy idea to smooth over things and place him in a high and honorable office, like the presidency of the South Carolina College. Whatever motive had influenced his political opponents, certainly we must praise the State for the course she pursued in the matter.

Again, we have spoken of the education which Mr. Preston received. Is it well to spend as much time and money on a col-

legiate education and a professional equipment as Mr. Preston did? I would answer that in his individual case it was money and time well bestowed and employed. Every case, however, depends upon its own peculiar environments. No general, or, perhaps, it would be better to say, no universal rule can be laid down. If a young man has only a limited amount of means, or if from any cause his early education has been neglected, and he finds himself lacking in time as well as in money, then he had better not take so extended a course. And even where everything is propitious, there is a danger of protracting too long the literary and professional course. We may unfit ourselves for practical life. We may become so accomplished and so highly educated that we will be indisposed to pass through the first and most trying years of a professional life, when we have to do the drudgery and have to undergo the humiliation and embarrassment which necessarily attend a beginner's course. And yet if a young man has the pluck and the nerve — if he has the requisite patience, I would say to him that, all things being equal, the more thorough his preparation the more likely is he to attain high success. If the reader will only think for a moment he will be surprised to see how many of our great men were well educated. John C. Calhoun received his academic training under Dr. Waddell, perhaps the most celebrated teacher this country has ever had. He then went to Yale College, where he graduated. Daniel Webster was a graduate of Dartmouth College. George McDuffie and Hugh S. Legare were both educated at the South Carolina College, and so also was James Louis Petigru. Indeed, in Mr. Legare's case, I might say that with the reception of his college diploma, his education was only commenced. He took an extensive post-graduate course afterwards and became widely traveled. Alexander Stephens, Bob Toombs, Ben Hill, and Henry Grady were all university-trained men. And so, in

most cases, we will find that if we call the roll of the great men of the country, we will be but mentioning the names of its college alumni. To put it on the lowest ground, a liberal education, both collegiate and professional, pays; and in most cases the more liberal it is the better.

Ought young men of the present day to emulate Mr. Preston in his oratorical attainments? Is it well to be, like him, a great orator? Is it not sufficient to be able simply to speak well? Will it not do only to study elocution so far as to be able to present your views clearly and forcibly? Is this not too practical an age for orators like Mr. Preston? Have we the time to waste on rhetorical sentences and well rounded periods? I have at times been disposed to answer in the negative. And yet were I to do so I am satisfied I would be wrong. The time will never come when the orator will not be in demand, — when eloquence will have lost its charm. God endows a man with the gift of eloquence and he endows the appreciative spirit as well. We soon tire of poor speaking; we soon get enough of much that is palmed off on us as eloquence; we find that the unnatural, artificial substitute quickly palls upon the taste: but true eloquence will always delight and charm us. To what does Mr. Bryan owe his wide-spread fame and wonderful popularity? To his speeches more than to anything else. Mr. McKinley's visit to Atlanta last winter would have lost much of its effectiveness, had he not been the speaker that he was. When he uttered those soul-stirring and ringing words: "Who shall be the first to pull down the flag from where it has once been planted? Shall it be done by you of the South, away down here in Dixie?" I was present and with the vast audience felt the power of his eloquence.

In every popular gathering oratory is a power. The man who can speak, necessarily excels, and to that extent outranks the one who is lacking in that power. It has always

been the case and always will be. "Many are the friends of the golden tongue," is a proverb as true now as ever. We want the wisdom of Moses, but we soon tire of his slow tongue and long for the eloquent utterances of Aaron. It was his splendid oratory that gave to Ben Hill of Georgia his magnetic power and wonderful influence. It was the eloquence of Grady that won for him deathless fame, charmed a nation, and placed the name of the young Georgian alongside of those who rank among the world's great orators. Eloquence is power.

The mention of Preston's name almost invariably suggests that of Legare. Both of them were fine scholars. Of the two, in point of classical attainment and high literary culture, I am disposed to think Mr. Legare excelled. As a writer I am sure he was Mr. Preston's superior. He was no doubt also better read in the law. In native intellectual endowments and in the acquisitions which come from hard study, he possibly ranked above Mr. Preston. But, on the other hand, while both of them were in a high degree eloquent, I think it is pretty generally conceded that Mr. Preston stood ahead in the department of oratory. As a conversationalist and post-prandial speaker, there is no question that Mr. Preston won and deserved the palm.

How did Mr. Preston and Dr. James H. Thornwell compare? Intellectually, I would say that Dr. Thornwell was the abler of the two. He was the greater logician and the more profound scholar. He was more deeply read and more exact in his scholarship. In the department of belles-lettres and in literature generally I take it for granted Mr. Preston was his superior. As a conversationalist I have no doubt Mr. Preston was decidedly more generally popular. In administrative ability and in the management of boys at college Dr. Thornwell was evidently Mr. Preston's superior. The South Carolina College reached its high-water mark under the administration of Thorn-

well. In speaking of Thornwell as president of the college, Dr. Laborde says: "I have long since come to the conclusion that he united more of the qualities which give fitness for the high office, than any one who has filled it; and abating none of my admiration for the distinguished men who preceded him, and holding them in grateful remembrance for their valuable services, still I must present him as the model president; as *primus inter pares*."

In the domain of eloquence they were both stars of the first magnitude. Here we find it hard to compare them. Each of them was well fitted for his peculiar field — Thornwell for the pulpit, and Preston for the hustings, the forum, and the political arena. As a graceful orator Preston may have been, and doubtless was, more universally popular; and yet it remains true that, at times, the eloquence of Thornwell has never yet been surpassed by that of any other orator on the American continent.

Mr. Preston's great rival for oratorical fame in Carolina, and perhaps in the South, was George McDuffie. And yet their styles were so dissimilar that it is hard to compare them. It has always seemed to me that Mr. Toombs and Mr. McDuffie resembled each other somewhat in their style of oratory. Both of them had a sweeping, overpowering style. They carried everything before them with a rush. They burst upon you like an avalanche from the mountain's side. Mr. McDuffie's eloquence came in torrents. Mr. Preston was more graceful and more varied in style. A writer in an article on "Higher Education in South Carolina" compares them as follows: "Of the men in public life, George McDuffie probably reached the highest rank. He and W. C. Preston were room-mates at college, and he was looked on as the Demosthenes of the State, as Preston was considered the Cicero." Preston was more ornate, more incisive, and more brilliant; while, on the other hand, Mc-

Duffie was more powerful, more terrific, and more tornado-like.

And now that I have about reached a conclusion, I would remark, in the words of Dr. Carlisle: "How transient and fleeting is fame!" Although Mr. Preston was one of the most highly educated men of America, was an exceedingly able statesman, and perhaps unsurpassed as an orator, was at different times a member of the South Carolina legislature, mayor of Columbia, United States Senator, and president of the South Carolina College, yet how little is known of him! In Barnes's "History of the United States," which is recognized by our school authorities and used in our common schools, Preston's name does not occur at all. I have looked in vain also for some allusion to him in Chapman's "History of South Carolina," a book which is also studied by the school children of our State. Nor is his name mentioned by Eggleston. These things ought not so to be. Are our children to grow up in ignorance of our really great men — those who have shed lustre upon our State and country, and who by their high characters and noble lives have not only won for themselves a place worthy of record on the historic page, but have furnished a pattern for study and emulation for all time to come? Whose fault is it that this is so? Some remedy must be devised. To the credit of the students of Wofford College be it said that, while they have honored themselves by doing so, they have at the same time perpetuated the name and fame of two of Carolina's great men, Calhoun and Preston, by giving their names to their literary societies. And in doing this they have fostered the spirit of eloquence and statesmanship as well. I am glad to be able to say that on the walls of the Preston Literary Society at Wofford there is suspended a fine picture of Mr. Preston. I would remark also *en passant* that in the Smithsonian Institute in Washington there is a splendid portrait representing Preston when in his prime.

In concluding, I would remark that the more I have studied Mr. Preston's life, the more highly I have admired him. It is impossible not to be charmed with some of the noble qualities he displayed. What a manly, independent man he was! He dared to support Harrison for President, even though the great majority of the people of his State were opposed to him. On a number of public questions, he opposed Calhoun when opposition to him meant political death in Carolina. In the later years of his life, he arrayed himself against nullification and secession when these were the burning issues of the day and when those who opposed them were severely criticised and fiercely assailed. And then, too, although an aristocrat by birth and breeding, see how progressive and democratic he was in his ideas of government! We find him away back, in the years before the war, advocating the election of the President directly by the people. We find, too, that he was president of the South Carolina College, when its roll of students was the longest it has ever been, either before or since. And what a splendidly educated man he was! Then think of his broad statesmanship and his magnificent oratorical powers. Enter the Senate chamber of the United States and hear him, as in eloquent terms—with powerful logic, splendid imagery, and charming rhetoric—he pleads the cause of the South, and in clarion note bids jarring discord cease, lest the Union be rent in twain and fratricidal war ensue. Or, if you would see him again at his best, go with him to the court-room, watch him as he rises to defend the prisoner at the bar, hear him as he progresses in his argument and rises from height to height, and finally as he reaches the culminating scene—the climax of oratorical splendor—hear him as he utters that pathetic, soul-stirring, heart-moving appeal that electrifies both court and jury—those burning words of eloquence: "Gentlemen of the jury, won't you save the

boy?" No wonder that he won for himself the soubriquet, "the silver-tongued"; no wonder that he should have introduced a style of oratory that is dubbed "Prestonian;" no wonder that he is known in the pages of history as "the Inspired Declaimer"!

With one or two practical lessons I will close. In the first place, I would remark, that Mr. Preston believed in the gospel of work and practiced what he preached. He was no advocate of one's trusting in his genius and native ability. Those bright young men and talented young women who waste their time at school and think that they can get along without study and work, will find no encouragement in studying the life and character of Mr. Preston. If there ever was any one who might have depended on his genius for success in life it was he, and yet he was an indefatigable worker all his life. And not only did he toil, but he counseled all those with whom he was associated in the capacity of teacher and friend that success is the reward of effort. And he maintained that this rule held good even in the department of oratory and rhetoric, where we are sometimes tempted to believe that work counts for but little and native talent for everything.

In the second place, he had a hopeful, sunshiny disposition. He looked on the bright side. He had no patience with croakers and no sympathy for them. He was charitable in his ideas and broadly sympathetic in his life and character. Old men and old women, and young men and maidens delighted to be in his company and were helped along in the battle of life by his companionship. That is the kind of man we like to meet. He sheds on those around him light, hope and sympathy.

In the third place, as I have said before, he was an independent style of man. He did his own thinking. He acknowledged no man as his master. He thought and acted for himself. He had his own convictions

and dared maintain them. How few such men there are! We need them in all the departments of life,—in the pulpit, at the bar, on the hustings, in the editorial sanctum, and, indeed, everywhere. How hard it is to be independent! How easy it is to go with the crowd!

I cannot close more appropriately than by quoting the following lines, spoken on one occasion before the Preston Society of Wofford College, and with which Mrs. Martin so gracefully concludes her sketch of Preston:—

“O for the thoughts, pure, holy, high,
Whence spring the words right, wise, and true!
O for the heart them to imbue
With sweet and winning sympathy—
Refreshing as the early dew,
And strengthening as the honey new!
Such words might charm an angel's ear,
Such words we mortals sometimes hear.

“Such words once spake a man I knew—
A glorious ‘old man eloquent,’
Whose every word seemed Heaven-sent,
So sympathetic, tender, true—
Our Preston, ‘golden-mouthed,’ seemed lent
Unto the world, to show how blent
Must be the bent of head and heart,
To fit the speaker for his part.”



THE LEGISLATION AND LOCAL GOVERNMENT OF KING ALFRED.

II.

BY WARWICK H. DRAPER, BARRISTER-AT-LAW.

THE system of local government established by Alfred a thousand years ago bears in idea and even in detail a singular resemblance to that enacted in the England of to-day by recent statutes. The research of scholars has produced trustworthy evidences of what Alfred, as compared with his immediate predecessors, did in this as in other particulars. We can clearly understand the condition of his country and his subjects. Neither at the birth nor at the death of Alfred was England a part of the main system of European politics; she took no share in the disturbing destinies of the empire of Charles the Great. The scene was clear for the evolution of Alfred's drama of reform, and it is part of his fame that he refrained from carrying arms outside her shores.

His subjects were freemen or slaves. Of the former, many were landless, bound to acknowledge a lord; the landed freemen were classified (excepting "Aethelings", princes of the royal blood) on the basis of the land which they held, the minimum being a single hide (thirty to thirty-three acres). An "Eorl" possessed forty or more, a "Thegn" five or more, and a "Ceorl" less than five. There were three kinds of slaves: the "theou," or slave simple; the "esne," or unfree hireling; and the "witetheou," or slave in some penal servitude.

The system of tenure and land division was as follows, Wessex and Mercia (one feature excepted) being regarded as types of the heptarchic kingdoms of England of the ninth century. The ecclesiastical unity alone combined these various kingdoms for military and other emergencies; it was

by the accidental destinies of history that Alfred of Wessex, like most of Egbert's dynasty, exercised a supremacy in such a combination. We may concentrate our attention upon Wessex as a leading but characteristic state, typical of the larger whole.

Absolute ownership of land in severalty had been long established among the Anglo-Saxons, and by the ninth century was becoming the normal principle of tenure. In "Boc-land" (*i. e. possessio*) an estate created by legal process out of the public land, we see property held in a manner common to the land tenure of the German, Frankish, Danish, and other European states. But the public land of the Anglo-Saxon system, called "Folc-land," was characterized by incidents which appear to have been peculiar to England; it comprised, speaking briefly, the whole area that at the original allotment had not been assigned to individuals or communities, or was not subsequently divided into estates of "boc-land," and it formed the standing treasury of the country, being let in leases for lives, the income from which fell into the public revenues. It may here be remarked that it is in charters of the eighth century that we first hear of the "fyrd," or military service, which, with the repair of bridges and the maintenance of fortifications, formed the *trinoda necessitas*, materially relieving the strain upon the public coffers.

The local administration of the country thus held was based upon a system entirely analogous to that of early Germany. In the very terms that are used, there is the closest relation between the records of Alfred and the Germania of Tacitus. The unit of this local division was the "township" ("tun-

scipe," "villata," or "vicus"), which in its ecclesiastical form was called a "parish". Some townships were free, others dependent, but all were presided over by a head man called "tun-gerefa" (cf. German "graf"), who in the latter case was nominated by the lord of the land. Such a township had its own "gemot" or assembly, where bylaws were made; but it is uncertain how far we may press the analogy between it and the early German "mark." A higher form of township was the "Burh," always the residence of a king, magistrate, or prominent noble. So we read of "cyninges tun," in Alfred's laws, while Bede speaks of Lincoln as such in the seventh century, having a "gerefa" as an officer. This official was called "port-gerefa," in such mercantile places as London, Bath, Bodmin, and Canterbury.

Between these towns and the shires came the Hundred or "Wapentake," the latter term being of uncertain etymology but referring rather to an armed gathering of free-men than to a local division: moreover, it must be borne in mind that neither one term nor the other actually occurs in any document before the tenth century laws of King Edgar, which also make first mention of "tithing" as a synonym for township. The tradition, apparently dating from the twelfth century, that Alfred set England in order by setting ten families in one tithing and ten tithings in one hundred is clearly unhistorical. None the less, it is highly important to appreciate the nature in the ninth century of a local idea clearly manifested in the tenth, of which there are distinct vestiges in the primitive organization of the German "pagus." The probable truth is that in and before Alfred's time each of many districts, varying in size and bounded by natural rivers and hills, contributed a hundred warriors to the host in the hour of national need: and that out of this custom came a local division which in Edgar's and Aethelred's days became the basis of spe-

cial taxation and police regulations; a monthly "Hundred-gemot," competent to declare folk-right in every suit, came, in the reign of Henry I, to be attended by lords within the hundred or their stewards, the parish-priest, the reeve, and the four best men of each township.

Intermediate divisions between the hundred and the shire, which may or may not have begun to be recognized in the time of Alfred, were the "Ridings" of Yorkshire, the "Rapes" of Sussex, and the "Lathes" of Kent.

In reaching the distribution into "Shires," we come to what very possibly was really the addition of Alfred to the land government of England. The term shire or "scir," signifies simply a share of a larger whole, and in former Anglo-Saxon days meant the territorial sphere assigned to an officer or magistrate. Thus Bede speaks often of the "Bishop's scire," while in Ine's Laws (A. D. 688-725) we have simply "scir" and "scir-man." A charter of Aethelstan, which, however, is probably spurious, speaks of *omnes Cantescyrae thaini*, but in the Anglo-Saxon chronicle (A. D. 851, 860) we find "Hamptonscire, Denascire, and Bearroscire," appearing side by side with "the Dorsaetaes, the Wilsaetas, and the Sumersaetas" (cf. the opening of Asser's "Life of Alfred." "In villa regia quae dicitur Wanading in illa paga quae nominatur Berrocsire"). Bearing in mind the connection of Alfred with these chronicles and the absence of contrary evidence, it seems reasonable to believe that Alfred invented "shires" when coming to terms with Danish Guthrum. Shires do not appear in their ecclesiastical form as archdeaconries until the twelfth century. The shire-officers were an "Ealdorman" and a special "gerefa," called the "sheriff." The "ealdorman," originally elected into the "Witena-gemot" with the consent of the king and "witan," seems to have held an office which became hereditary even before the introduction of

shires, in the relation to which it was quite possible for him to be ealdorman of more than one. But every shire was under an ealdorman, who sat with the sheriff and bishop in the folk-moot, received one-third of the profits of jurisdiction (at any rate, in the time of Edward the Confessor), and, as "heretoga," or "leader of the host," commanded the military forces. The "sheriff," whose post was referable to but more distinct than the "scir-man" of King Ine, was nominated directly by the king as his steward and judicial president of the shire. It was he who convened the shire-moot, which was chiefly concerned with intercepting appeals to the king in council. The practice, for which there was foreign analogy, appears to have been that twelve "Thegns" appeared in this court and, on the institution of a kind of grand jury, presented to the sheriff the report of the lesser district. There is a clear distinction between this *quasi*-German "folc-gemot" of the sheriff and the old state-assembly or "gemot," of the ealdorman; the former was, in Edward's reign, held monthly, the latter only twice a year.

In Alfred's reign the "Witena-gemot," or Supreme Council, which was not a simply representative assembly, ceased to be connected with a geographical division. It was attended by the king and his family, his chief courtiers, his bishops and ealdormen, and a number of "witan" or wise men; it is improbable that in Alfred's time the total number exceeded sixty, although in 934 ninety-one attended a meeting at Winchester.

The "witan," it has been said, "possessed a consultative voice and a right to consider every public act which could be authorized by the King," this was the corollary of their theoretical power of electing and deposing him, which was actually practiced until Alfred's case. It is yet one more token of his dominant personality that from the day when, as the strong man of the occa-

sion, he assumed the crown amid the clanging of arms, he increased the personal importance of the kingly power. Insensibly, but none the less really, the relative importance of the subject decreased with the growth of population; it is true that the first trace of the idea of treason to the king does not appear until the time of Alfred's son, but his own laws give significant indications of the change: amongst these may be noted the provisions as to the king's bail and protection, his power over life, and the higher assessment of his "wergild," or price payable to his kin on his violent death. Alfred, like Augustus, changed the reality without seeming to change the appearance; the secret of his success was that he did it for the public good. He was no more a despot than he was a figure-head. From the day of his accession his officers were the national officers, and, in a theory frequently practiced, he required the consent of his "witan" in the exercise of legislative, judicial, and other functions. The preface to his laws (already quoted in our former article upon Alfred's legislation) may be taken as an instance of the obedience paid by his forceful individuality in this respect to the dictates of a tactful prudence; its phrases show that it was with the consent of his chief council that he made additions to the existing body of folk-right. The judicial functions of the council, however, were confined to the ultimate hearing of appeals, and it is improbable that it was concerned with taxation before the extraordinary imposts of Dane-geld ordered a century later. Alfred most probably consulted with his wise men, as in fact he seems to have done in treating with Guthrum, in deciding a policy of peace or war; but as leader of the host (as he was also the ultimate judge on appeal) he became more influentially than any king before him, the privileged representative of the unity and dignity of his nation.—*The Law Times*.

LONDON LEGAL LETTER.

LONDON, December 2, 1899.

THERE is a certain picturesqueness in connection with the formal opening of the High Court at the beginning of the winter term which seems to be more and more appreciated each year, if one may judge by the increasing crowds that assemble to witness the brief ceremony. Such a display would be impossible in the United States, or, for that matter, anywhere else, for in no other country are the costumes of judges and counsel so varied and effective. It may possibly be questioned whether the time occupied in the ceremony, which practically takes up the whole of the first day of the term, might not be better spent in hearing cases, but I think even those lawyers in the United States who are most careless as to forms and distinctions would be impressed with the dignity of this English function and would be compelled to admit that it tends to enhance the authority of the judges and the position of the members of the bar.

The entrance of the judges into the courts on the first day of the term was preceded by two religious services, one in Westminster Abbey and the other in a Roman Catholic chapel near the Law Courts. At the Abbey the scene was rendered most effective by the presence, in their wigs and robes and gowns, of the judges, the law officers of the Crown, and the Queen's Counsel, with the junior members of the bar. These were massed to the number of four or five hundred in the transept, while a large congregation assembled in other parts of the venerable and historic edifice, attracted by the novelty of the scene. While the service was in progress, a still more striking one was taking place in the Roman Catholic Chapel. This was "the Red Mass," and it was attended

by the Lord Chief Justice and Mr. Justice Matthew and Mr. Justice Day, and a score or more of Queen's Counsel and juniors, who are Roman Catholics. The Red Mass is so called because, in accordance with the Roman ritual on such an occasion, the vestments and the altar surroundings are all red. In Catholic countries it is always celebrated before the sitting of Parliaments, the Law Courts, or before the beginning of any great public function. It had died out in this country, but was revived about ten years ago, in order to give greater solemnity to the opening of the new term.

In addition to these religious services, the Lord Chancellor on the opening day, in accordance with time-honored custom, received the Lord-Mayor elect of the City of London at the House of Lords, and held a reception of, and gave a breakfast to, Her Majesty's judges. After these functions, which naturally consumed all the morning and lasted until two o'clock, the judges repaired to the courts, which they entered in formal state. The structure of the building in which the courts are held lends itself to this display, as its main hall is a long gallery, not unlike a church nave. Upon these occasions it is crowded with gaily dressed women, the guests, for the most part, of the younger members of the profession, who, after the ceremony, take their lady friends to their rooms in the various inns of court for tea. The procession is headed by the ushers of the courts, who are arrayed in court dress, with silk stockings and buckled shoes. After them come the Masters in Chancery and on the Common Law side, and then appears the Lord Chancellor, who is preceded by an officer bearing the seal of state. Following him are the Lord Chief Justice, the

Master of the Rolls, the Lord Justices, the Chancery and Common Law judges, the Attorney General, the Solicitor General, Queen's Counsel and the leading members of the outer bar. Each of the judges is arrayed in state robes, that of the Lord Chancellor in black and gold and the Chief Justice in scarlet and ermine, and each judge is attended by officers of the court and his personal clerk. This procession moves slowly through the great hall and finally ascends the northern stairway, at the head of which the judges separate to go to their respective courts, the Lord Chancellor, the Master of the Rolls, and the Lord Justice constituting a bench of appeal.

This year the procession was witnessed by ex-President Harrison and Mrs. Harrison, and the American ambassador and Mrs. Choate, and three diminutive, but gorgeously dressed, Japanese judges. The last-named did not attract nearly so much attention as Mr. Harrison and Mr. Choate, the latter particularly being a great favorite with the English judges and lawyers. Mr. Harrison, after struggling to understand the meaning of the differences in color and cut and decoration of the various legal robes, and the distinction between Queen's Counsel and Juniors, and barristers and solicitors, was led away to lunch with the Lord Chief Justice.

Much of the same attention to ceremonial, and for the same reason, is maintained by the judges upon the opening of the assizes in the various towns throughout the country. It undoubtedly impresses the populace, and adds to the submission that is paid to the judges by litigants in civil proceedings, and to the terror the law inspires in criminals.

I happened to be at Liverpool a few days ago at the opening of the assizes in that city. The judges were Mr. Justice Kennedy, who was the guest of the American Bar Association last summer, and Mr. Justice Phillimore. Long before the time fixed for the opening of the court a crowd had

assembled upon the steps and the pavement in front of the court. The approach of the judges was announced by two heralds with a fanfare upon trumpets from which banners depended, the heralds being dressed in a quaint uniform. Behind them, and escorting the judges when the latter descended from their state coach, were guards armed with the halberd, an old-time combination of spear and battle-axe. The judges, who were in ceremonial wigs and gowns, were further attended by the sheriff of the county in full military uniform, the latter's chaplain, also in uniform, and certain law officers and clerks. Upon entering the building Mr. Justice Phillimore proceeded to the court where civil business is despatched, while Mr. Justice Kennedy went to the Criminal Court. The opening of the latter court was in keeping with the formality of the judges' entrance. Upon the bench at the right of the judge were the sheriff and the chaplain, and upon the left the marshal and the crown officer. The marshal read the commission under which the assize was held, and then the grand jury was sworn in. The latter occupied a little gallery to the right of the judge, while the petit jurors sat on his left. The grand jurors consisted of the Lord Mayor, a county court judge, an admiral of the navy, a baronet, and several knights, while all the others were magistrates. After the charge, the grand jurors retired and despatched their work with such celerity that in a few moments the first true bill was found, and the first prisoner was called to the bar. It may be interesting to American lawyers to know that when the first petit jury was sworn an opportunity was given to the prisoner to challenge any juror. The right was not exercised, and the same jury remained in the box throughout the day, no counsel thinking it incumbent upon him to ask any one of its members a question touching his qualification as a juror.

STUFF GOWN.

The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
HORACE W. FULLER, 344 Tremont Building, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

FACETIÆ.

"Do you expect to get a jury?" asked one lawyer.

"I don't know," answered the other. "It's pretty hard to find a man with intelligence enough to answer our questions who hasn't read the newspapers and formed some opinion about the case."

THE late Lord Esher tried to console a certain lady litigant whose case he could not take by saying that the case would be tried by a well-known judge without a jury. "He's a splendid lawyer, you know, and will try your case very nicely." "Oh, yes, my lord," the lady answered. "Mr. Justice — is a very good lawyer, but my case requires so much common sense."

IN a case of an assault by a husband on his wife, the injured woman was reluctant to prosecute and give her evidence. "I'll lave him to God, me lord," she cried. "Oh, dear, no," said the judge; "it's far too serious a matter for that."

MR. C.: They call him a one-horse judge.

MR. Y.: How did he get that name, do you suppose?

MR. C.: Because he's such a weak charger, I imagine.

NOTES.

UNDER the title, "Luccheni Redivivus," the London "Lancet" gives some interesting psychological data which have been obtained since the imprisonment of Luccheni, the assassin of the Austrian Empress. Twice since his trial and conviction he has attempted suicide. Within the last few days (May 13) his moral condition has

undergone a change confirmatory in a significant degree of the diagnosis which found vanity or megalomania at the root of his crime. The cantonal *juge d'instruction*, in an attempt to ascertain, if possible, his associates in the crime, visited him in his cell, and approached the subject with what seemed to himself due dexterity and caution. At once the previously downcast and abject creature brightened up, his eyes sparkling with gratified self-importance. "I giornali riparlano di me (So the journals are talking of me again)?" he exclaimed interrogatively. The judge disclosed the object of his visit. Luccheni thereupon dallied with his interlocutor, smiling at his reminiscences of the crime, assuming airs of reticence, even indulging in self-contradiction to tease if not torment his judicial antagonist. It was learned, however, that in the preliminaries leading up to the assassination he really had accomplices; beyond this, nothing new was elicited from him. The point of chief importance, however, to be observed in this account is the large part which vanity and a desire for the widespread public attention which such crimes bring about plays in reconciling the criminal to his fate, and even leading to the commission of crime in cases where the mental balance is very unstable. Hence this class of criminals should always be tried and punished with as little publicity as possible, not only because this policy deprives the individual of a show, with himself as the center, but also because every such public trial is liable to lead to the commission of similar crimes by other mentally unsound degenerates, who are sure to attend such spectacles whenever it is possible.

A WASHINGTON, D. C., police court had occasion recently to pass upon the very momentous question whether the proprietor of a monkey can be compelled to furnish it with shoes. On the complaint of some benevolent idiot, Pietro Florello, by profession a hand-organist, was hauled into the temple of justice to answer a charge of

cruelty to animals, in that he was utilizing a bare-footed monkey in the collection of his precarious income. After a careful research into the law of domestic relations, the court reached the conclusion that Signor Florello was under no legal obligation to furnish his friend with footgear, and the case was accordingly dismissed.

In some of the cases brought against Lord Bacon implying corruption, the sums of money received by him were not gifts at all, but money borrowed, and recoverable as debts. Three of these cases gave rise, after Bacon's death, to a curious question. Being claimed by the lenders as "debts" due to them from the estate, the executors pleaded that they had been decided by the House of Lords to be "bribes." (Bacon, Works, XIV, 264, ed. Ellis and Spedding.)

ONE of the most extraordinary cases in which the over-ruling power of sleep was ever exemplified was that of Damiens, condemned for treason in Paris in 1757. He was barbarously tortured, but remarked that the deprivation of sleep had been the greatest torture of all. It was reported that he slept soundly even in the short intervals which elapsed between his periods of torture. Among the Chinese, a form of punishment for crimes consists in keeping the prisoner continually awake, or in arousing him incessantly after short intervals of repose. After the eighth day of such sleeplessness, one criminal besought his captors to put him to death by any means they could choose or invent, so great was his pain and torment due to the absence of "nature's soft nurse." Persons engaged in mechanical labor, such as attending a machine in a factory, have often fallen asleep, despite the plain record of pains and penalties attending such dereliction of duty, to say nothing of the sense of personal danger which was plainly kept before their eyes.

INTERESTING GLEANINGS.

A NATURAL soap mine and a paint mine have been discovered in British Columbia. Several soda lakes recently found in the foothills near Ashcroft, we are told by "Feilden's Magazine," have bottoms and shores encrusted with a natural washing compound containing borax and soda, and equal to ordinary washing powders for cleansing purposes. About 275 tons

of the compound have been cut and taken out of one lake, being handled exactly like ice. One lake alone contains 20,000 tons.

THE largest library in the world is that of Paris. It contains upward of 2,000,000 printed books and 160,000 manuscripts. The British Museum contains about 1,500,000 volumes, and the Imperial Library at St. Petersburg, about the same number.

THE year of 47 B.C. was the longest year on record. By order of Julius Cæsar it contained 455 days. The additional days were put in to make the seasons conform as nearly as possible with the solar year.

THE oldest city in the United States is Albany, N. Y., which was incorporated in 1686, Philadelphia dating fifteen years later. New York, Chicago, and Philadelphia are the only American cities whose population runs into the millions. Some odd contrasts are presented in the tables of statistics, issued by the Department of Labor at Washington, which gives the area covered by the different cities. It appears that Taunton, Mass., occupies a territory greater than that of either Boston or Baltimore. New Orleans, a city of 285,000 inhabitants, covers 125,600 acres, while Newark, N. J., with a population of about the same size, occupies less than 12,000 acres. One expects to find the manufacturing districts of Pennsylvania, Massachusetts, and Illinois closely packed; but it is surprising to notice that Richmond, Va., covers only 6,520 acres, and Louisville, Ky., 12,800 acres, as compared with Duluth, Minn., and Des Moines, Iowa, which, with much smaller populations in each case, cover respectively 40,960 and 34,560 acres.

HEALTH statistics show that McKeesport, Pa., is perhaps the healthiest city in this country. Its rate of deaths from consumption is only 1.09 per thousand, as compared with twelve in Boston and New York, and twenty-six in Denver, Colo.—due, of course, to the fact that consumptives resort to Denver from all parts of the country. The rate of 13.60 deaths per thousand from old age (considerably the highest on the list), is accredited to Salt Lake City, a condition to account for which no theory has yet been brought forward. In Pittsburg and Chicago deaths from old age are only two per thousand.

At a time when the extension of municipal functions is occupying public attention, it is interesting to note the figures which relate to city ownership.

Ninety-six cities in the United States own their water-supply, among the exceptions being Indianapolis, New Haven, New Orleans and San Francisco. Four have municipal gas-works — Duluth, Richmond, Toledo, and Wheeling — and thirteen own and operate electric-light plants.

A COMPANY in London insures umbrellas. If you can prove that your umbrella has been stolen, the company pays you what it was worth.

ALL the countries of Europe are spending on their armies and navies at the rate of \$50 a second, or the almost incredible sum of \$4,000,000 a day.

LITERARY NOTES.

THE December NEW LIPPINCOTT breathes the Christmas spirit throughout. The complete novel by Ernest Rhys under the striking title of "The Whistling Maid," is a romance of rushing interest and weird beauty. Of almost equal importance with the longer novel is a brief one by William D. Howells, called "The Magic of a Voice," a bright and amusing tale of upper New York State. An attractively subtle story "The Perfume of the Rose," by Flora Annie Steel; a Christmas paper on "The Real Star of Bethlehem," by Julia MacNair Wright; "The Return of William Penn," in December, 1699, by William Perrine; "Washington's Death and the Doctors," by the authoritative pen of Solomon Solis Cohen, M.D.; and a delightful talk about "Alphonse Daudet and his Intimates," written by Jean François Reffaëlli, comprise a contents most interesting and seasonable.

THE Christmas number of SCRIBNER'S contains several striking novelties in illustration. Maarten Maartens, the distinguished Dutch author, tells in "An Author's Story," a love episode in the life of a successful novelist; Octave Thanet writes a story in what is for her an absolutely new vein; Bliss Perry has a tale of two rival churches in a New England village; a story of "The Jewish quarter in New York" is another feature, by A. Cahan. The author of "The Peach" contributes "The Senior Reader," a character out of the British Museum. Dr. F. A. Cook, who recently returned with the "Belgica" Antarctic expedition, writes of the possibilities of future expeditions, and Albert White Vorse reviews America's past achievements in Antarctic exploration.

ALLEYNE IRELAND opens the December ATLANTIC with "Briton and Boer in South Africa," a clear, strong, and comprehensive statement of the events

and causes leading up to the present war in the Transvaal, stated from the English standpoint; Hamilton W. Mabie contributes a brilliant and searching review of Edgar A. Poe's "Place in American Literature"; Henry D. Lloyd pays an enthusiastic tribute to New Zealand, its paradoxical attractions and its solid advantages. Under the curiosity-provoking title of "Wanted, a Chair of Tent-Making," Alfred Brown, Layman, discusses the causes of the modern decline of the ministry. Harriet Monroe pictures the glories and wonders of the Grand Cañon of the Colorado; Lúcy Martin Donnelly contributes an adroit and sympathetic essay, "In Praise of Old Ladies." The fiction and poetry of the number are unusually brilliant and original.

THE first place in APPLETON'S POPULAR SCIENCE MONTHLY for December is given to a carefully written article on "Exact Methods in Sociology," by Franklin H. Giddings. President David Starr Jordan presents in "The Education of the Nemist," an admirable and very amusing satire upon the pretensions of "The Christian Scientists." A history of the "Development of the American Newspaper," during the past one hundred years is contributed by Walter L. Hawley. In "How Standard Time is Obtained," Mr. T. B. Willson explains the delicate methods by which the hour is verified from day to day. "In Agricultural Education in Foreign Countries," Mr. W. E. De Riemer gives brief accounts of what is being done in the European states, Great Britain and its colonies, Japan, Mexico, and South America.

IN the December number of the AMERICAN MONTHLY REVIEW OF REVIEWS there is an editorial summary of the results of the elections, with a discussion of their import as an indorsement of the administration's policy. The editor also describes the progress of the Philippine campaign, the war in South Africa, and many other matters of international interest.

THE cover of the December *Century* is suggestive of the approaching Christmas season, the central figure of the design being a kneeling angel, with outspread wings. "The Christmas Dancers," a poem embodying a Saxon legend, is accompanied by several full-page pictures in color. The holiday spirit breathes as well in Jacob A. Riis's story of New York's East Side, "The Kid Hangs up His Stocking," Dr. Weir Mitchell's poem, "King Christmas and Master New Year," the reproduction of Alden Weir's "A Christmas Tree," and Thomas A. Janvier's "A Provençal Christmas Postscript," being further legendary lore of Provence. In this number

Sir Walter Besant begins a series of papers on life in East London. A famous name is that of Henryk Sienkiewicz, who contributes a prose-poem, "The Judgment of Peter and Paul on Olympus."

DURING the fifty-six years of its existence, THE LIVING AGE has steadily maintained its high standard. It is a thoroughly satisfactory compilation of the most valuable literature of the day. By its aid alone the reader can, with an economy of time, labor, and money, keep well abreast with the literary and scientific progress of the age and with the work of the ablest living writers. Science, politics, biography, art, travel, public affairs, literary criticism, and all other departments of knowledge and discussion which interest intelligent readers are represented in its pages.

WHAT SHALL WE READ?

Mr. Goldwin Smith's new history of THE UNITED KINGDOM,¹ gives the reader a clear, connected and succinct view of the political history of Great Britain as it appears in the light of recent research and discussion. The work is written in a most interesting manner, and what would be merely dry facts in the hands of the ordinary writer are invested with a charm and attractiveness which make these volumes as readable as an historical novel. The work covers the period from the fifth century down to the reign of Queen Victoria, and those desirous of obtaining a clear, comprehensive idea of the political history of the United Kingdom will find all that is necessary condensed within the limits of two comparatively small volumes. We heartily commend this work to our readers.

The Funk & Wagnalls Co. have just issued a new edition of *Curiosities of Law and Lawyers*,² which is filled with innumerable good things relating to the legal profession. Here one will find many of the favorite sayings, bits of facetiae and legal anecdotes, as well as explanations of curious and memorable doctrines and incidents, all of which make up the "natural history" of the lawyer tribe. The present edition has been greatly enlarged, nearly four hundred pages of new material having been added. We know of no volume better adapted to amuse and edify both the lawyer and the layman.

So much has been written of Lincoln, that it would seem as if the material concerning him must have

¹ THE UNITED KINGDOM, a political history by Goldwin Smith, D.C.L. The Macmillan Co., New York, 1899. Two Vols. Cloth. \$4.00.

² CURIOSITIES OF LAW AND LAWYERS. By Croake James. New edition, greatly enlarged. Funk & Wagnalls Co., New York, 1899. Cloth, \$3.00.

been utterly exhausted, and yet Mr. Norman Hapgood, in his *Abraham Lincoln, The Man of the People*,¹ gives us the story of this great man's career with such a charming freshness and simplicity that we feel that we have never until now had a real insight into the plain, homely, everyday life of this remarkable man. A chapter on "Lincoln as a Lawyer" will particularly interest the legal profession. We can say without exaggeration that the biography is one of the most remarkable ever written, and the American reader should be deeply grateful to the author who has thus enabled us to know Lincoln as he was known by those most intimately associated with him.

NEW BOOKS FOR LAWYERS.

HANDBOOK OF THE LAW OF NEGLIGENCE. By Morton Barrows, A.B., LL.B., of the St. Paul bar. West Publishing Co., St. Paul, Minn. 1900. Law sheep. \$3.75.

This volume is the latest addition to the publishers' "Hornbook Series" designed especially for the use of law students. The author gives with accuracy and simplicity the gist of the law upon the subject, and the treatise is one which the general practitioner will find of value and assistance. The notes and citations are numerous and satisfying.

THE LAW OF PLEADING, under the Codes of Civil Procedure. By EDWIN E. BRYANT, Dean of Law Faculty, University of Wisconsin. SECOND EDITION. Little, Brown & Co., Boston. 1899. Cloth.

The first edition of this excellent text-book for students appeared in 1894, and the best proof of its usefulness is the fact that a second edition is already demanded. The author gives a clear but condensed statement of the general principles of the law of pleading, to which is added an analytical index in which is given the code provision as to pleading in each of the States which have adopted the reformed code procedure.

FIRST STEPS IN INTERNATIONAL LAW. By SHERSTON BAKER, Bart., of Lincoln's Inn. Little, Brown & Co., Boston, 1899. Cloth.

Questions of International law arising during the late war with Spain, particularly those concerning the rules of warfare and the position of neutrals, induced the author to prepare this manual. The work is one which will appeal to both lawyer and layman, and will be especially appreciated by students of this branch of the law. It is written in a remarkably clear and easy style, and the author is to be congratulated on having succeeded in so fully covering his subject within the limits of a moderate sized volume.

¹ ABRAHAM LINCOLN, The Man of the People. By Norman Hapgood. The Macmillan Co., New York, 1899. Cloth.



JOHN PHILPOT CURRAN.

The Green Bag.

VOL. XII. No. 2.

BOSTON.

FEBRUARY, 1900.

JOHN PHILPOT CURRAN.

By CLAUDE G. BOWERS.

THE great advocate is embodied Justice. He stands between passion and reason, prejudice and innocence — and in the clear, pure tongue of truth directs the investigation for facts. Erskine pleading the cause of unlicensed printing, Mackintosh defending the liberty of utterance, Hamilton asserting the integrity of property over the passion of revolutionary hatred, Chauveau Lagarde, within the certain shadow of the guillotine, appealing to French honor in behalf of his beautiful queen, and Labori rising superior to his country as the mountain rears its head above the plain — these are among the heroic pictures of the world.

Perhaps, in all the history of the British judiciary, there never was a time when a patriotic advocate could give more and receive less, than during the period of Irish coercion, about the latter part of the last and the first of the present century. The intelligence and patriotism of Ireland beginning to rebel against the insufferable yoke of foreign domination, the English government attempted to quiet the murmurs through the intimidation of a harsh domestic policy. Brutal, therefore, as were her measures in every department of the state, the culmination of all the intolerable perfidy was reached, no doubt, in the management of her judiciary. It is doubtful if, in all the history of the world, there has been a baser travesty of justice than that which characterized the Irish state trial in the latter days of the last century — a travesty which borrowed meanness from the hypocrisy which accompanied it. Officers of state, solemnly sworn to the administration

of English justice, were black with the vermin of venality and crime. The whole fabric of the judiciary was as rotten as the principles of Castlereagh and his minions. Mediocrity was dignified by a polluted ermine; courts of inquiry were transformed, under the leer of a degraded ministry, into inquisitions; while men reasoned with threats, and convinced with powder. The fiercest bully became the greatest jurist, and the meanest informer, the purest patriot. Genius sacrificed itself to Power and Peace, since Plunket, with an eloquence as rare as it was servile, scattered flowers in the path of his country's betrayers. Honor abdicated the bench and ascended the scaffold. The courts became farces more ludicrous than the French sense of honor. Trials for treason, upon the result of which rested the life of a man, the happiness of a family, and the honor of a nation, were instituted in the morning and concluded at midnight. Short however, as was the period of torture, enough of injustice was crowded between the daybreak and the candlelight, to cast a shadow over the whole history of British justice. Truth was suppressed as treasonable, and falsehood accepted as gospel, as it fell from the lips of men notoriously criminal and hopelessly debased. Prisoners were presumed to be guilty until they proved themselves innocent. One man alone, regardless of character, was sufficient to convict a fellow-man, and hand him to the hangman. That one man, bearing the proud title of informer, was a sort of animal too foul for description, who, playing the friend and turning the spy, delivered his

country's friends to the noose of his country's enemies. Judges were prosecutors. Juries were either bought by gold or intimidated by power. In some instances, as in the case of Orr, whiskey was introduced into the jury-room and verdicts of death were written while in a state of semi-sensibility. During the progress of the farcical trial, armed troops were stationed within the court to intimidate, if possible, the juror and advocate, while the galleries were oftentimes packed with drunken ruffians, who howled maledictions upon the head of the prisoner and his counsel.

At this period, when the purest of patriots were targets for accusation, one man stood forth from the body of the bar and, with an eloquence that was as commanding then as it is immortal now, plead the cause of Ireland, in the courts, as brilliantly as ever did Grattan in parliament or O'Connell on the hustings—John Philpot Curran.

I have before me a copy of his picture, painted by Sir T. Lawrence. It is a picture of animation. Those splendid eyes, clear, sharp, yet beautiful and generous, dancing on the verge of every passion, the coal-black hair, half covering the noble forehead with rebellious locks, the sweet poetic mouth, the mirth-provoking brows, all speak of eloquence.

Born of lowly parentage, the early days of his life were spent meandering about the streets of the uncouth village of Newmarket. By his marked superiority to his playmates, he early attracted the attention of the resident minister, who drilled him in the classics, and furnished the necessary material aid with which to enter Trinity College, Dublin. Devoting himself while there to the classics and metaphysics, with an occasional midnight orgy at the shrine of Bacchus, he graduated in his twenty-third year, and immediately entered as a student of law at the Middle Temple, London. Here, a victim of the most abject poverty, he sustained himself poorly by contributions to periodicals

which brought him neither fame nor fortune. That which was wanting in material comfort, however, was made up in mental exhilaration, and his stomach played the miser that the gormandizing longing of his mind might be realized. From his letters home we catch a glimpse of the life he lived, sinking oftentimes into the gloom of constitutional melancholy, dining oftentimes "upon a whistle in the park," studying until his exhausted mind would receive no more, and then sinking to rest and dreaming of his beloved Ireland, all bound in chains.

His life flowed fast. Suffice it to say that his fearlessness and eloquence soon elevated him to a position of opulence and power, and that he stood supreme among the advocates of the land when the series of state trials called him into the fierce light of universal renown.

To discard minute historic particulars it is our intention to analyze the qualities which make him the rival of Lord Erskine. A great many scholastic critics have adjusted their nose-glasses and in the calm seclusion of their studies have analyzed the orations, and most profoundly heralded the discovery of an adjective too strong—a figure somewhat exaggerated. To understand and appreciate Curran we must know that he was not declaiming set pieces before a critical assembly. Nor did he care a rap what might be the verdict of Professor A. concerning the rhetorical propriety of his sentences. Upon his utterance rested perhaps the life of a fellow-man, and it was for the verdict of the jury and not the favor of posterity that he exerted all his splendid powers.

He fought desperate battles, took advantage of every opportunity that lay in the way of his client's cause, advanced, retreated, fought, sometimes the guerrilla fight, and, from the intensity of his heart, permitted the torrent of passionate appeal and denunciation to flow, unscanned for minor defects. If he used strong words, there existed strong-

er provocation. If some figures were exaggerated, some imaginations necessary to be touched were dull and sluggish. And then he was an Irishman, with all his native brilliancy and constitutional weaknesses, blending imperceptibly the one into the other. Pathos and humor, wit and sarcasm — all that enters into the composition of a master of emotional oratory were the nobility of his brain.

The misty legends of a romantic past were the intellectual food of his earliest years, and as he grew older and began to view himself the moss-covered remains of that golden era, his imagination carried him into an emotional love of the land of his nativity. The poetic nature of the mother manifested itself in the fancy of the son. Killarney's magic lakes, the glittering stars, the solitude of the hills, where poets glean the wild flowers of the night, the ruined castles, eloquent with tales untold — all the poetry of nature permeated his personality.

He was a part of nature's self. The unnatural confinement of the artificial garden he never knew. He clambered over the hills and fields, associated with all kinds of men, and found, perchance, as much of poetry in the plain tale of wrinkled age as in the glowing pages of the poets. Destined as he was to pass his life in the most exalted circles, he never learned to scorn the lowly cabins of his childhood. In the wild Celtic dance, the weird wake, the midnight carousal, and round the fireside of the humble, he learned men as well as books; and here he found that magic chain that bound him to his kind. By all the ties of consanguinity and association, he was bound to that great body of the common people who constituted the major part of the Irish population. In after years, he knew every chord that vibrates in the breast, from keeping alive and active every feeling of his own. Enriching his naturally brilliant mind with all the priceless lore of Greece and Rome, he cultivated his emotional nature in the university of experi-

ence. And so we should expect to find in the oratory of Curran, that emotion and facts predominate over unembellished intellect and theory.

A man of heart and feeling, he conveyed his messages in words of fire, and painted pictures that will live when canvas scenes have turned to dust. In rich and glowing sentences, with a voluptuous diction, he painted pictures and touched the mind and heart as men have seldom done. To read his defense of Rowan and Finnerty is to know the knack of pouring forth one's heart in words — to feel the throb of a heart that long has ceased to beat. His forte was with a jury, where emotion plays the heaviest part. Still, when occasion called, as in the case of Justice Johnson, he could, in addressing a court, be as concise in statement, subtle in logic, and pure in taste as our own Webster or Mason.

His greatest efforts were reserved for more tempestuous occasions when, in the late hours of night, he arose in the light of flickering candles, and regardless of frowning arms and sneering judge and hostile audience, he bent all his matchless energy to the accomplishment of one end — to touch the heart and wring the conscience of a corrupt or intimidated jury. *Then* pictures beautiful or horrid were conjured up by his imagination and painted with artistic skill; perjurers were lashed by his scorpion-like invective until they fled from the room to escape the lava of the awful truth; pathetic tales of persecution and suffering were related with a tenderness and vividness that bring tears to the eyes to-day; humor flashed, wit pierced, sarcasm lacerated, and as we float with him along the unresisting stream, we pass scenes of association sweet to the hearts of patriots, flowers and meadows, cabin and prison gloom, sunshine and shadow — all, — everything that wrings the heart and leads the will-power captive, combining to make us partisans of the speaker's cause.

He was superb in invective. His denun-

ciation of O'Brien, the criminal informer in the case of Finney, is one of the most blood-curdling combinations of epithets in the language. Take Macaulay's essay on Barère, add Prentiss's denunciation of poor Reynolds, treble the power of those combined masterpieces, and then you may approach the fierceness with which Curran assailed the state witness. The case stood thus: The evidence of O'Brien alone stood between his client and an acquittal. The acceptance of Mr. O'Brien's testimony meant the immediate execution of Mr. Finney. The entire defense therefore rested on breaking down the testimony of the informer.

This masterly effort is pure invective from exordium to peroration. In marked contrast to his accustomed style of beginning the address in a conciliatory manner, he assumes the aggressive from the first, demanding an acquittal and characterizing the evidence as a "tissue which requires no strength to break through"—which "vanishes at the touch and is sundered into tatters." Beginning thus defiantly, he seems to gather ferocity from the swing of his own passionate determination; now condemning false evidence in the abstract; now eulogizing the jury that sifts the false from the true; now fervently calling down the blessings of Heaven upon the long sleep of the legislators who enacted the humane laws governing the trial for treason; and then, after clearly and concisely elucidating that law and expressing his abhorrence of such a crime, he enters into a discussion of O'Brien's evidence.

In a few words of sarcastic glee he fairly laughs the fictional evidence out of court, and then, armed with an arsenal of invective color words and figures, he begins his denunciation of the "detestable informer" who "would dip the evangelists in blood," adjuring him in taking the oath to swear upon the knife, "the proper symbol of his profession." Portions of this invective fairly grate by their fury, and it is a phlegmatic soul who

can read unmoved the story of degeneration so skillfully revealed.

Quite naturally, Curran's bitterest denunciations are reserved for the informer. In his defense of Finnerty he delivers some titan blows upon that institution in the abstract. Here he is brilliant, rising to the most sublime heights without ever descending to buffoonery. And here, too, we find an example of scholastic criticism in the general horror expressed by fastidious bookworms over Curran's description of the informer, who "is buried a man, lies until his heart has time to fester and dissolve and is then dug up—a witness." His greatest misfortune seems to lie in that having attempted to conceive an idea of horror, he has succeeded.

He mixed emotions as an artist blends colors, to form a harmonious and perfect whole. His manner of gliding along from concession to statement, from statement to pathos, from pathos to indignation and from indignation to command is nothing less than marvelous. It was not at all uncommon for audiences that greeted his opening statement with derision to draw his carriage home with the most touching enthusiasm. So gradually and so naturally did he carry his hearers with him that they hardly realized that they were losing ground, when they found themselves face to face with and hating their former selves. We have a striking example of this in the case of Finnerty. And what was the Finnerty case? Briefly then:—Orr, a man of eminent respectability, is accused of treason, and, while under the influence of liquor, the jury finds him guilty and he is condemned to death. Upon the return of sobriety, the jury petitions the authorities for a new trial upon the aforesaid grounds. Promises are held out only to be withdrawn and the farce culminates, as usual, in judicial murder. These facts, with proper force and condemnation, were published by Finnerty, who was immediately charged with libel. Curran appeared for the defense.

In reviewing the circumstances surrounding the trial and death of Orr we have an instance of Curran's remarkable power of bringing his client's cause home to the heart of the jury. With the simplicity of pathetic facts he supposes that the jury had been a witness to the tragedy of Orr,—that they had seen him in his dungeon, heard the cry of his children, and the clank of his chains, listened to the lies of the informer, and witnessed the drunken jury as, with insensibility, it condemned innocence to death. He imagines that they had heard the self-condemnation of that miserable jury at the feet of authority; had watched from the bosom of that unhappy family the uncertain attitude of the court; had marched with Orr through the crowds of hostile ruffians to his execution in the early dawn, where "he dies with a solemn declaration of his innocence and utters his last breath in a prayer for the liberty of his country." Later on, in the event of conviction, the orator with vivid imagination accompanies the jurors home to the bosom of their families, and adjures them to tell the children that hang upon their knees the story of the day. But let Curran speak: "Tell them the story of Orr's captivity, of his children, of his crime, of his hopes, of his disappointments, of his courage, and of his death; and when you find your little hearers hanging upon your lips, when you see their eyes overflow with sympathy and sorrow, and their young hearts bursting with the pangs of anticipated orphanage, tell them that *you had the boldness and the justice to stigmatize the man who had dared to publish the transaction.*"

Curran's pathos is sweet and simple, like that of Burns and Dickens, and hard would be the heart that to this day can trace without a tear the melancholy pictures that came from that marvelous mind. In the case of the Marquis of Headford we find another striking example of pure pathos in the eloquence with which he paints the domestic tragedy. It is a prose poem in the

minor strain. If ever an advocate won hearts by pathos, it was Curran. In his argument in the case of Justice Johnson before Lord Avonmore, an early friend, long estranged by the bitterness of a partisan age, he dissolved the anger of years in the manly tears he called to the eyes of the judge by the beautiful pictures he painted of the "Attic nights" and buried friends of the long ago. The "tender grace of a day that was dead," seemed to inspire the orator with visions that regained an ancient friend.

Of all the glowing gems that ever came from the heart of a lover of liberty, in portraying the exquisite splendor of his mistress's charms, none will surpass in fervency and beauty Curran's splendid tribute to the spirit of universal emancipation in his defense of Rowan.

In politics Curran was an enthusiastic follower of Fox and Sheridan. Devoted to liberty above all else and sympathizing with the people, as against Pitt's policy of repression, he had nothing in common with the Tory party. His political exertions in the Irish parliament were exclusively bent to the accomplishment of Irish independence. Like Erskine and Choate, however, he was not equally brilliant at the bar and in politics, and his defeat in the only fight he ever made for a seat in the English parliament probably robbed him of no added lustre. His long devotion to the party of Fox was rewarded by the appointment of master of the rolls—a position he held until fast-failing health warned him that dissolution was near at hand.

Tradition says that the brilliant advocate became a commonplace jurist. Nor should we expect that the eagle that soars and sweeps the airs of every clime would appear to advantage in the confinement of a cage. To transplant the fervent advocate to the cold, dispassionate wool-sack, is like placing a tropical bird in some harsh northern clime and expecting it to sing with wonted ardor. Noble as is the judicial position, it can never

rise above, nor sink below, nor evade what legislation and precedent have wrought. Quite naturally this was not to Curran's taste, and he pined as with home-sickness for the excitement and glory of the bar.

He stored his mind with the richest gems of literature and some few favorite works he read and re-read incessantly. Like all great masters of English, he never tired of Shakespeare. Antony's oration he pronounced the greatest ever composed. To study his speeches is to be impressed by his familiarity with Biblical lore. The Iliad was his constant companion, and it is related by the brilliant Phillips that, while at sea, in the midst of a furious storm, he wept over the misfortunes of Dido. Richardson's "Clarissa Harlowe" he considered a master work in pathos. Who knows — perhaps the beautiful and pathetic speech in the case of the Marquis of Headford may have been inspired by the perfidy of Lovelace and the sorrows of Clarissa? He had much in common with Burns. Phillips gives us a picture of Curran in the cabin of the poet, weeping like a child.

After his country, literature was the passion of his life. For several years he had in contemplation a historical novel dealing with modern Ireland. Not infrequently he dashed off verses for the amusement of his friends, several of which, to the regret of his admirers, have been inserted in his son's biography. One, however, bearing the sanction of Moore, and not unworthy of his musical pen, is not at all unpleasing. It was written on returning a ring to a lady. The first verse is not bad: —

"Thou emblem of faith, thou sweet pledge of a passion
By heaven reserved for a happier than me.
On the hand of my fair, go resume thy loved station,
Go bask in the beam that is lavished on thee!
And if some past scene thy remembrance recalling
Her bosom shall rise to the tear that is falling,
With the transport of bliss may no anguish combine,
But be *hers* all the bliss, and the suffering all *mine*!"

Curran, however, was essentially a prose poet, and no one familiar with his genius

but will regret his failure to carry out his conception of the novel.

His Irish love of luxury manifested itself in the beauty of his home, "The Priory," where he surrounded himself with much that art and nature can bring. All the beauty of rustic scenery embraced the wooded grove wherein was nestled the convivial seat and under whose spreading branches he meditated those noble sentiments which, in the heat of forensic fire, were to blossom into immortal eloquence. Here was buried the beloved daughter who carried to the grave so much of paternal affection. Here in hours of despondency and gloom he sought the sympathy of nature, and in the murmur of the trees, and the aroma of the field and forest, he found that consolation which no human agency can impart. And here he entertained his friends. Such friends! Here poets, orators, statesmen came — the greatest of all lands — artists, actors and ambitious youths — and here the dining-hall was illuminated day by day with all the brilliancy of unfettered genius.

Upon resigning his judicial position and recuperating awhile amidst the swirl of London dissipation and the scandal of an English watering place, he crossed the channel for a farewell visit to Paris. In a letter he says, "Paris will think it graceful to be volatile as long as London considers it dignified to be dull." His letters from Paris were brilliant and amusing, familiar and glowing with humor, with an occasional overflow of eloquence. His character sketches were equal to Dickens's, his stage notes not unworthy of Winter, his wit and humor as irresistible as that of Sheridan. What a novel he could have written! What dialogue! what sketches! what beauty!

But Nature had ordained that Curran should leave nothing to literature, save the volume of his speeches on which his reputation rests. One evening, while dining at the country seat of Tom Moore, a paralytic

attack in one of his hands warned him of the coming dissolution. Unable now to carry out his literary ventures, and sick at heart over the pitiful state of Ireland, he was not unwilling to sleep the last long sleep. The few months of remaining life were spent in the midst of friends, and the loyalty and love of those who knew him were the stars that accompanied him through the darkness to the dawn. With an occasional dinner, an opera now and then, and conversation, he alleviated his physical suffering, and on October 14, 1817, in the city of London, the finger of Death closed his eloquent eyes forever. Daniel O'Connell, writing to Phillips two days later, says: "Charles, there never was so honest an Irishman. Of *all*, the *only* incorrupted and faithful. His very soul was republican Irish. On his coffin should be laid a broken harp and a wreath of shamrock."

He was buried in London.

Twenty-two years later the appreciation of the Irish manifested itself in a patriotic demand that their greatest orator and most intrepid defender should rest under the skies he loved and among the men he served. One dark, stormy November night in 1829 a funeral cortege moved slowly through the gloom of the Dublin streets. The rain

fell violently, and the shriek of the wind, the vivid flash of lightning, and the war-like roar of thunder combined to make a weird and melancholy picture. Ireland had reclaimed her brilliant Curran.

Never did a man rest beneath a greater wealth of tributes. Statesmen and poets bent all their powers of elegant expression in choosing words sufficiently strong to express their keen appreciation. Enemies pronounced him eloquent, able and pure. Friends mourned him with bleeding hearts, and patriots with a sincerity too intense to melt in tears. W. H. Curran wrote a biography, the tribute of a son. Phillips's brilliant pen traced in a poetic manner the story of his life, the tribute of a friend. Ireland erected a monument of stone, the tribute of a nation. But sweeter and far more touching than them all were the myriad tears the poor and lowly shed, because they were the heartfelt tribute of humanity. When the shamrock grows no longer on the hills of Tara; when the splendor of Malachi shall be utterly forgotten in national degeneration; when memories are cold and all true hearts are dust; when love of justice and genius shall find no place in the bosom of men, then, and not until then, will the brilliant fame of John P. Curran go out in darkness.



ANCIENT ROYAL WILLS.

THE oldest English will on record is that of Alfred the Great, in the original Saxon, and printed by the Clarendon Press in 1788, with a preface and two translations, — one literal and the other free. It was preserved in a register of the Abbey of Newminster, at Winchester, founded by Alfred; and the entry, or exemplification, appears to have been made between 1028 and 1032. This curious document begins by reciting a devise of Ethelwolf to his three sons, of whom Alfred was the youngest, and the manner in which property had at length come to the possession of Alfred on the death of his brothers. He gives certain specified lands to each of his three sons; certain manors to each of his three daughters; others to his two nephews; five or six manors to his cousin; "And to my two sons one thousand of pounds, to each five hundred of pounds; and to my eldest daughter, and to the middlemost, and to the youngest, and to Ealhwith, to them four, four hundred of pounds, to each one hundred of pounds." There is no mention of the crown; and the will of the greatest king of the Saxon dynasty contains nothing to distinguish it from that of a wealthy franklin or alderman invoking, as was not unusual, the sanction and support of the Witenagemote to the disposal of his possessions.

When Sobieski, the heroic King of Poland, was on his deathbed, and was exhorted by an attendant bishop to make a will, he refused, saying: "We kings, to our sorrow, are not obeyed while living; can we expect to be obeyed after we are dead?" A good many of the wisest have formed such expectations notwithstanding; and the notion that dominions and subjects were disposable like chattels naturally enough prevailed in times when the constitution was unsettled and the

prerogative undefined. Thus William the Conqueror made no scruple of devising the newly-acquired realm of England to his second son, William Rufus, the succession of Normandy and Maine having been already assigned to Robert. His will appears to have been nuncupatory; for he is described as making a long and pathetic speech on his deathbed, in the course of which he named the sums which were to be distributed amongst religious communities and the poor.

William Rufus' manner of death left him no time for testamentary dispositions; and all we are told respecting Henry I. is that he ordered his natural son, Robert, Earl of Gloucester, to take £60,000 out of his treasure to be distributed amongst his servants and soldiers, and directed his body to be buried at Reading Abbey, where no memorial of him remains. Stephen died intestate; and Henry II. was content, as regards the crown and its appurtenances, to permit the received law of succession to take its course. His will merely recites a distribution already made of various sums of money to religious houses (including the Knights Templars and Hospitallers), and towards the marriage of "poor and free women wanting aid." The conclusion is a solemn appeal to his sons and the heads of the English Church to watch over the fulfillment of his behests.

Richard I.'s will was nuncupatory, like the Conqueror's. Hovenden relates that: "When the king's life was despaired of, he devised the kingdom of England and all his other dominions to his brother, and made all present swear fidelity to this said John, and ordered his castles and three parts of his treasure to be delivered to him, and all his jewels he devised to his nephew, Otho, King of the Germans, and directed a fourth of his treasure to be distributed amongst his ser-

vants and the poor. Then the king ordered that his brain, blood, and entrails should be buried at Chaluz, and his heart at Rouen, and his body at Font Evraud, at the feet of his father."

King John's will, though formally drawn in Latin, was prepared under circumstances which did not admit of attention to particulars. It recites that, overtaken by grave illness, the testator felt compelled to trust the disposition of his effects to his executors, including the cardinal legate, three bishops, three earls, and four other men of note, without whose advice, he adds, he should have done nothing in the matter even in sound health. They are directed in general terms to make satisfaction for any wrongs done by him, to contribute towards the recovery of the Holy Land, to provide for the support of his children, and to bestow alms on the poor and on religious houses for the good of his soul. The only specific direction relates to his body, which was to be buried in the Church of St. Mary and St. Wulstan at Worcester.

The will, in Latin, of Henry III. bears date A. D. 1253, nineteen years before his death. The alleged motive for making it was a meditated expedition to Gascony. It is distinguished by prudence and foresight, and provides for those who had claims on him under all probable contingencies. The guardianship of his eldest son and heir, Edward, and his other children, along with that of his dominions, is committed to his queen, Eleanor. All his gold, with the exception of the royal jewels, is bequeathed "in aid of the Holy Land, to be carried thither, with my cross, by stout and trustworthy men to be chosen by my said queen and my executors." He appoints the Church of the Blessed Edward of Westminster for his place of sepulture, "notwithstanding that he had formerly chosen the New Temple of London."

The only will of Edward I. of which any trace is extant was made at Acre shortly be-

fore his father's death. The principal provision is one for resting, in case of the demise of the Crown during the nonage of his son, the realm of England and all other lands that may accrue to him in the executors, four of whom are constituted a quorum. As he survived his father and reigned thirty-five years, his will became virtually inoperative.

Edward II. died intestate.

Edward III.'s will, made the year before his death, begins with a reference to the doctrine of original sin, expatiates on the transitory nature of all things human, and then proceeds in the ordinary style to provide for the burial of his body and the welfare of his soul. He limits the number of candles to be lighted at his funeral, and directs masses to be said for himself and his deceased wife Philippa. Edward the Black Prince having died the year before, the heir apparent, Richard, is thus remembered. "We give and bequeath to our future heir, whom God preserve, namely, Richard, son of our eldest-born Edward, of honored memory, one entire bed, with its furniture, marked with the complete arms of England and France, now in our palace at Westminster. We also give and bequeath to him four other beds, which used to be laid out in four lower rooms of the said palace, also with their entire furniture. Also we give and bequeath to him a double set of hangings for his hall, one large and noble, the other plain and light, adapted for carriage." Besides the executors, at the head of whom stands John of Gaunt, the Archbishops of Canterbury and York are appointed supervisors of this will.

The will of Edward the Black Prince, made shortly before his death, bears marks of ample deliberation, and contains minute directions touching his funeral, tomb, and epitaph, which was to consist of fourteen lines of his own composition. He was curiously rich in beds. Three are specially devised to his eldest son Richard, namely, the blue bed with ostrich plumes, which the king

his father gave him; also a bed of red camate which is quite new, and all that belongs to it; also a great bed embroidered with angels, with the cushions, etc. Equal attention is bestowed on the disposal of several sets of hangings. His friends and followers are carefully provided for; and a malison is invoked upon his son in case of hindrance or neglect in the carrying out of his good intention on their behalf. The widow of the Black Prince and mother of Richard II. was Joan, daughter of Edmund of Woodstock, commonly called the Fair Maid of Kent. Her will, dated 1385, the year of her death, is in Latin, and, like her deceased husband's, much of it is occupied with beds, only she particularizes the precise dimensions of each, including the curtains and counterpanes.

In the sixteenth year of Richard II. a statute was passed enacting that "Our Lord the King, his heirs and successors, Kings of England, may freely make their wills, and that these shall be duly executed." John of Gaunt's will fills fifteen quarto pages, and the codicil, six. His wardrobe, furniture, plate, and jewels are distributed piece by piece, or in small lots, amongst his relatives and followers, and liberal alms are set apart for the avowed purpose of inducing various religious bodies and the destitute poor to pray for him. He directs that his body shall be kept above ground for forty days, and that on each of these forty days forty marks of silver shall be distributed amongst the poor, on the eve of the burial three hundred, and on the day of the burial "if it seem to my executors that this can be done, considering the quantity of my goods and my other ordinances and devises. — Item, I devise to be burnt round my body on the day of my burial, first ten great tapers, in the name of the Ten Commandments of our Lord, which I have too wickedly transgressed; and, besides these ten, that there be placed seven great tapers in the memory of the seven works of charity which I have neglected, and for the seven mortal sins; and, be-

sides these seven, I will that there be five great tapers in honor of the five principal wounds of our Lord Jesus, and for my five senses, which I have very negligently wasted, for which I pray God's mercy; and, in addition to all the aforesaid tapers, I will that there be three in honor of the Blessed Trinity."

Henry IV.'s will is principally remarkable by being the first written throughout in English. As it is dated January, 1408, eight years after the death of Chaucer, the language was only just beginning to be fixed, and Norman-French or Latin was still in use in the courts of law. The will of Edward, Duke of York, was made the day after the taking of Harfleur. "Imprimis, I devise my soul to the grace and mercy of our Lord Jesus Christ, Who created it and formed it of nothing, as that which is the most guilty and disnaturall creature He ever formed, considering the great indulgence and sufferance He has shown to me from day to day, notwithstanding my foolish life and the vileness of my sins." Thus runs the exordium of his will.

Henry V.'s will is also in English, and directs that certain castles and lordships, already conveyed in trust, be made over to his brothers, John and Humphrey, in succession. The will of Henry VI. was made in the twenty-sixth of his reign, more than twenty-three years before his death. His father prophesied of him at his birth that he would be more a monk than a monarch; and his will justifies the prediction, for, though very long, it is almost exclusively occupied with provisions (which, however, were very wise and liberal) for the foundation and endowment of Eton and King's Colleges. The castles, lordships, manors, lands, tenements, etc., granted to feoffees for this purpose, are described as £3395 11s. 7d. yearly.

Towards the end of the fifteenth century the promotion of learning began to be considered a higher order of good work than

the establishment of masses, and schools and colleges became the objects of pious bounty, instead of convents and chantries. The will of Margaret, Countess of Richmond, mother of Henry VII., exhibits the reactionary and the progressive doctrines in marked contrast. After providing for a variety of masses, she leaves the bulk of her property for the benefit of Christ's and St. John's Colleges, Cambridge. That much of what she destined for St. John's was abstracted by Wolsey and other courtiers, through the culpable complicity of her royal grandson, was no fault of hers.

The will of Henry VII. directs that open proclamation shall be made in every shire town, for all who had suffered wrong to appear, and prove their case.

The will of Henry VIII. is in perfect keeping with his character, beginning with a mixture of dogmatism and the pride that apes humility, and proceeding to dispose of the entire kingdom, as, indeed, he was authorized to do (failing his children and their issue) by statute 35 Hen. 8, c. 1. The first "Defender of the Faith" resolutely upheld as many of the doctrines of the Roman Catholic Church as could be reconciled with his summary rejection of its supremacy, and with the seizure of a large portion of its temporalities. He therefore directs a sermon and mass on the morrow devoutly to be done, and "that all Divine service accustomed for dead folks to be celebrated for us in the proper place where it shall fortune us to depart this transitory life." After providing for the foundation of the Poor Knights of Windsor, he proceeds to entail the Crown by nearly the same forms of expression as are used in ordinary marriage settlements, passing over the line of his elder sister, the Queen of Scots, in favor of that of his younger sister, the Duchess of Suffolk; and he appoints a council for his son until he shall have accomplished his eighteenth year.

Beds, it seems, of the most sumptuous

materials were in the Middle Ages a fashionable luxury. Sheets, blankets, pillows, and coverlets or counterpanes, are frequent subjects of bequest; and one lady of quality, Katherine, Lady Hastings, having borrowed money of another, Cecilia, Marchioness of Dorset, wills (1503) "that the said Cecilia, in full contentation of such sums of money that I owe unto her, have my bed of arras, litter, tester, and counterpane, which she late borrowed of me." The costliness of the materials may be estimated from the tradition that the bed, with the furniture, prepared for James I. at Knowle cost £7000, the curtains being cloth of gold. Bequests for masses and pilgrimages abound, and it is curious to observe to what extent the belief in the efficacy of vicarious performances prevailed. Thus, in Sir Roger Beauchamp's will (1379), we find: "Whereas I am bound to do service on the infidels, by devise of my grandsire Sir Walter Beauchamp, to the expense of two hundred marks, I will that Roger, son to Roger my son, shall perform the same when he comes of age." The Earl of Hereford (1361) directs: "A chaplain of good condition be sent to Jerusalem principally for my lady my mother, my lord my father, and for us; and that the chaplain be charged to say masses by the way at all times that he can conveniently for the souls; and that a good and loyal man be sent to Canterbury, and to offer there xl. s. silver for us; and another such man to Pomfret to offer at the tomb of Thomas, late Earl of Lancaster, xl. s."

When Le Balafré, Quentin Durward's uncle, hears of the mishap that has befallen his family, he bites off a few inches of his gold chain, and sends them to a monk with this message: "Tell my gossip that my brother and sister, and some others of my house, are all dead and gone; and I pray him to have masses for their souls as far as the value of these links will carry him, and to do on trust what else may be necessary to free them from purgatory. And, hark

ye ! as they were just-living people, and free from all heresy, it may be that they are well nigh out of limbo already, so that a little matter may have them free of the fetlocks; and in that case, look ye, ye will say I desire to take out the balance of the gold in curses upon a generation called the Ogilvies of Angusshire in what way soever the Church may best come at them."

This is the spirit in which masses were commonly ordered. The testator's main object was to get what he thought money's worth for his money. Thus Sir Thomas Littleton (the author of the "Treatise on Tenures," rendered famous by Coke's commentary) leaves a sum of money for masses "for the souls of my feder and moder, and for the soul of William Burley, my father-in-law; and for the soul of Sir Philip Chatur, and for all souls that I am most bounden to pray for." The average cost of masses may be collected from a clause in the will of Joan, Lady Cobham, in 1369:

"I will that vii. thousand masses be said for my soul by the Canons of Tunbrugge and Tanfugge, and the four orders of Friars in London, viz., the Friar Preachers, Minors, Augustines, and Carmelites, who for so doing shall have £xxix. iii.s. iv.d." This is rather less than three halfpence per mass.

The Earl of Salisbury, the son of Henry II. by the fair Rosamond, bequeaths for the building of a monastery (*inter alia*) "a thousand sheep, three hundred *muttons*, forty-eight oxen, and fifteen bulls." The Earl of Warwick, in 1369, leaves: "To every church within each of my manors the best beast which should there be found, in satisfaction of my tithes forgotten and not paid; and I desire that my executors make full satisfaction to every man that I have in any sort wronged." The object of bequests to the church, or for pious uses, was not ex-

clusively superstitious, for wills were seldom set aside or evaded when the priesthood had a direct interest in upholding them.

Prior to the invention of printing, books, or copies of manuscripts made by hand, were very dear and scarce. They are particularized as carefully as plate or jewels, and the quality of the reading of the higher orders may be collected from the literary treasures they bequeath. Bequests for the erection of statues and monuments are of frequent occurrence, and the directions are sometimes both curious and minute, as in the will of Isabel, Countess of Warwick, in 1439: —

"Also I will that my statue be made all naked, with my hair cast backwards, according to the design and model which Thomas Porchabon has for that purpose, with Mary Magdalen laying her hand across, and St. John the Evangelist on the right side, and St. Anthony on the left; at my feet a scutcheon, impaling my arms with those of the Earl, my husband, supported by two griffins, but on the sides thereof the statues of poor men and women in their poor array with their beads in their hands."

Guichard, Earl of Huntingdon, wills that his heart be taken out of his body and preserved with spices, to be deposited in the Church of Engle. The preservation of the nobler members, especially the heart, was frequently enjoined.

Since the Revolution of 1688 the wills of English sovereigns have been practically regarded very nearly in the same light as those of private persons, and by 39 and 40 Geo. 3, c. 88, it was enacted that all such personal estate of His Majesty and his successors respectively as shall not come in the right of the Crown, shall be subject to disposition by last will and testament under the sign manual. — *The Law Times*.

ABSENT-MINDEDNESS ON THE BENCH AND AT THE BAR IN
IRELAND.

ABSENT-MINDEDNESS is not generally in the category of the failings of eminent lawyers. There are, however, in the careers of some of the most eminent men both at the bar and on the bench some well-authenticated instances of this weakness. Here are some curious stories of this failing: —

Mr. Peter Burrowes was called to the Irish bar in 1785, and died in 1841, in his eighty-eighth year. He was the most celebrated advocate of his generation, and is believed by competent critics among his contemporaries to have surpassed in brilliancy of intellect, Plunket, Burke, and Curran. Burrowes owed his lack of promotion to his relations of cordial personal friendship with the leaders of the Irish insurrectionary movement in 1798, and late in life was appointed to the very subordinate post of commissioner in the Irish insolvent court. All through his life he was noted for his absent-mindedness. A friend who called on Peter Burrowes found him one morning in his dressing-room shaving himself with his face to the wall, and asked him why he chose so strange an attitude. The answer was, "To look in the glass." "Why, there is no glass there," said his friend. "Bless me," exclaimed Burrowes, "I did not notice that before." Then, ringing the bell, he called the servant, and questioned him respecting the looking-glass which had been hanging on the wall. "Oh, sir," said the man, "it was broken six weeks ago." It is recorded of Burrowes that on circuit a brother barrister found him at breakfast time stand-

ing by the fire with an egg in his hand and his watch in the saucepan. Burrowes had to state the case for the prosecution in a murder case which caused much excitement. In one hand — having a heavy cold — he held a box of lozenges, and in the other a small pistol bullet, by which the man met his death. Ever and anon between the pauses in his address he kept supplying himself with a lozenge, until at last in the very middle of a sentence, his bosom heaving and his eye starting — a perfect picture of horror — he exclaimed: "Oh-h-h! gentlemen, I've — I've swallowed the bullet!"

The late Right Hon. Edward Pennefather, who was chief justice of Ireland from 1841 till 1846, when presiding at the O'Connell state trials in 1844, was the victim of a curious freak of memory. On more than one occasion during his charge to the jury he seemed to be oblivious of the fact that he was on the bench, and referred to the counsel for the traversers as if he were prosecuting at the bar, as "my learned friends on the other side."

The late Mr. Justice Keogh, who was a justice of the court of common pleas in Ireland from 1856 till his death, in 1878, attended a representation of "Macbeth" in a Dublin theatre. When the witches, in reply to the Thane, who inquired what they were doing, declared that they were doing "a deed without a name," the learned judge, catching the sound of the words, and imagining, no doubt, he was on the bench, exclaimed, "A deed without a name! Why, it's not worth sixpence!"



JAMES TOWN OF PEMQUID WITH FT. CHARLES IN 1677, AS DESCRIBED.
 A-VILLAGE; B-FORT; C-HARBOR; D-POINT CALLED BARBICAN; E-SUBTERRANEAN PASSAGE.

Conquest in 1622, a Palisade; in 1677, a Palisade and Bastioned Redoubt of Earth and Timber with Cannon. A left.

LINCOLN (MAINE) BAR.

ITS COLONIAL ROOTLETS 1607, AND CLIMAX 1899.

BY R. K. SEWALL.

IN English jurisprudence the bar represents a conception and contrivance in the administration of law, founded on the Roman idea of a tribunal of justice. The bar is a factor of our civilization. It is, in fact, a duly organized body of men, schooled and skilled in the principles of justice to be an organ of sovereignty, to determine questions of right and wrong in society, and enforce the demands of natural justice, agreeably to good conscience and fair dealing.

Lincoln bar is the representative of legal procedure in the earliest appliances of the common law of England in New England as a colonial factor. Originally its jurisdiction embraced a section of the coast of North America in and about 44° N. L.:—a country specifically located between Cape Small Point and the eastern expansion of Pemaquid dependencies, on discovery, in 1602, called by the natives "Mavoo-shen"¹; in the English colonial transactions of 1607 contracted to "Moashan"²; and in the annals of colonial English literature described as "The Kingdom of Pemaquid."³ The earliest civil organization for general legal procedure, was formed into a ducal province, as the county of "Cornwall," after that of England, the home in the fatherland of many of the early immigrants thereto.

Lincoln was applied to the same civil jurisdiction in 1760, in honor (it is supposed) of the ancestral home of Governor Pownall who signed the act creating the county.

With these facts relating to the origin, succession, name and *jurisdictional territory* of *Lincoln bar*, we proceed to the facts of

antecedent administration of law and justice within its bounds; together with the principles of civil polity on which the administration vested underlying legal rights.

We therefore go back to the reign of Queen Elizabeth of England, when her nobility besieged the throne with calls of urgency for English colonial seizure and planting of North American soil. "The wings of a man's life," they cried in her ears, "are plumed with the feathers of Death,"¹ till the head of the English bar was authorized to act in the premises, and the Royal Licensure of April 10, A.D. 1606, was issued;—the charter-party of the Popham colonial exodus from England, in 1607, embracing a code of civil principles which were organized, on the colonial landing, and into its Pemaquid expansion; and enlarged in the patent of February 20, 1631, and there reduced to practical use, in the judicial construction of a civil polity on the basis of the common law of England.

The first court organized in New England was within the ancient jurisdiction of Lincoln bar and in Popham's town of Fort St. George, where first was applied the forces of the common law of England as a colonizing agency. The antecedents of Lincoln bar were the outgrowth of the royal charter aforesaid:—an indenture drawn up by Lord Chief-Justice Popham of England.

Its execution began in the English seizure and possession of the peninsula of "Sabino," August 20, A.D. 1607, the west shore of the mouth of the Kennebec river, then, as now, known as the "Sagadahoc," its Indian name. The colonial grant was a pregnant act, having fuller expansion at Pemaquid

¹ Hutchinson Hist. Map. ² Popham's despatch.

³ Strachy.

¹ Brown's Genesis.

and old "Sheepscot farms," up to 1689; and matured in the administration of law, as now, at Wiscasset Point in 1794.

The unfolding of the charter of April 10, 1606, started English homestead life and industries on North American shores in lat. N. 43° to 44°. One hundred and twenty English colonists landed under the English flag. The site of a town was chosen. The first act was solemn consecration of the spot by the worship of God and a sermon, according to English canonical law and formularies of the English Episcopal Church. A code of law was promulged

The president with sworn assistants were the court officials. It had a seal, "Sigillum Regis Magnae Britainiae, Franciae et Hiberniae,"¹ was the legend of one side; and on the other, "Pro Concillio Secundae Coloniae, Virginiae."

All the rights, privileges and liberties of English home-born citizenship were guaranteed. Trial by jury and the writ of *habeas corpus* were grants of right to the people.²

Every safeguard of life, personal liberty and property, to the English common law appurtenant, was set about the new homestead life of the English race here, as a



PEMAQUID HARBOR.
(Site of "Jamestown." Capital of Cornwall County (1665) and Fort Charles.)

and civil polity organized, and a court of law opened.

Sir George Popham was nominated, not as a viceroy, governor or mayor, but as president of the embryo state, to wield the sovereignty thereof, and duly inducted to office, with subordinates, by solemn oath.

The material fruits of the movement were an English hamlet of fifty houses, warehouse, a church with a steeple to it, an elaborately entrenched fort, well mounted with guns, a shipyard with a thirty-ton vessel on the stocks and a court of law.

hedge, even to the use of the elective franchise in the civil office of chief magistrate.³ So all the forces of Christian civilization were planted at Sagadahoc. Tumults, rebellion, conspiracies, mutinies, sedition, manslaughter, incest, rape and murder were capital crimes. Adultery, drunkenness and vagrancy were penal offenses.⁴

¹ Popham Memorial vol., Appendix S. p. 133.

² Idem, Appendix A, p. 94.

³ "These my loving subjects shall have the right annually to elect a president and make all needful laws for their own government," etc. Memo. vol., page 94.

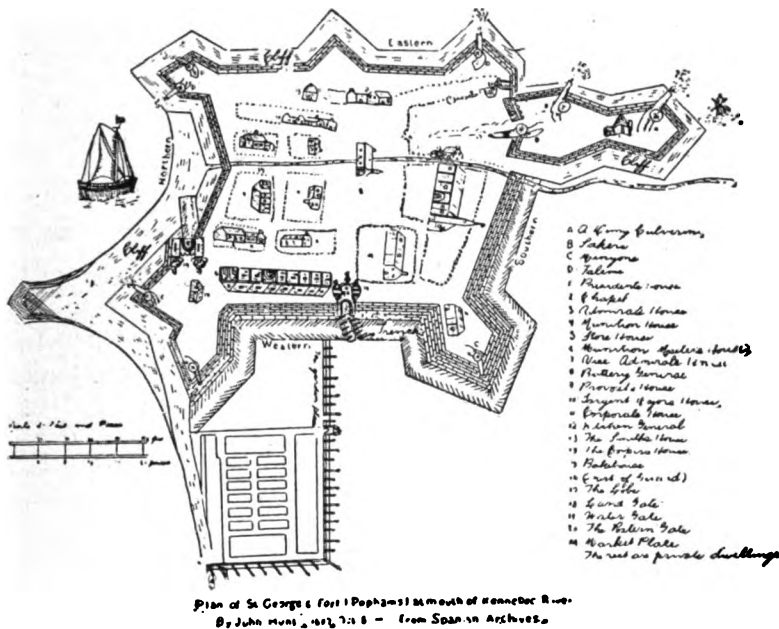
⁴ See Charter, April 10, 1606.

All offenses were required to be tried within the colonial precinct. Magistrates were ordered to hold sentence on judgments recovered in abeyance for appeal to royal clemency to secure a chance for pardon. To facilitate this feature of legal mercy, the court was required to keep full records and preserve the same. Preaching of the Christian religion was ordained as matter of law, as well as Christian teaching and civilization of the Indians.

It will be seen the scope of jurisdictional

Lord George Popham, the first president of a civil magistracy (shall we say within the United States?) and first chief justice of a court of law within the ancient jurisdiction of Lincoln bar, is described as having been an aged, God-fearing man,¹ stout built, honest, discreet and careful, somewhat timid and conciliatory; but he was the life of the colony, made up of London men and West of England rural life.

Rawley Gilbert, second in command, representative of the London city element of



issue of the court at its colonial start in this county was substantially, as relates to crime, the same in its cognizance as now.

No records of the adjudications of the court of Popham's town of Fort St. George have yet been recovered.

The only legal public paper extant is a despatch of President Popham to the King of England, dated at the old town, December 13, A.D. 1607, detailing present success and incidents of promise of the colonial holdings, written in Latin, the then language of state papers.

the colonial adventure, is said to have been a very different man from his chief.

He is described to have been a "sensual, jealous and ambitious man, of loose habits, small experience, poor judgment, little religious zeal, but valiant," and a mischievous factor in colonial affairs.

The prudent Popham, nevertheless, reconciled differences and soothed friction during his administration, which ended with his life in February, 1608. The last of January, fearful thunder, lightning, mingled rain and snow,

¹ Brown's Genesis of the United States.

hail and frost, for seven hours in awful succession overwhelmed with cyclonic winter rigors the colonial hamlet at Sagadahoc.

It survived the climatic rigors, but encountered the death of its godly chief on February 5, 1608, further to experience catastrophe in the selfishness, irresolution and caprice of the Gilbert succession to the management of the life issues of the new beginnings. Popham was no doubt a victim to the climatic convulsion of the January storm.

The spring brought timely supplies from England. Captain Davis reported "he found all things at Sagadahoc in good condition: — many furs stored, and the "Virginia," a pretty thirty-ton vessel, built, launched, ready for service."

Nevertheless Admiral Gilbert planned a return to London; and having the sympathy of the London faction of the colonists, set sail in the London ship "Mary and John," with the pretty "Virginia" and her master-builder, Digby of London, laden with colonists in sympathy at least with Gilbert, — abandoning the colonial Sagadahoc river site. "The colonial president was dead, and Admiral Gilbert had sailed away on or about the eighth of October, 1608, with all but 'forty-five' of the colonists,"¹ is the story of Captain John Smith. So it is not certain there was entire consent to the return of all the colonists on the official abandonment. It is certain the Popham flagship, the "Gift of God," and her fly-boat or tender, are not mentioned in the return.

But the Lord Chief Justice of England, Sir John Popham, had died, and his son Francis had succeeded to his father's estate; and by him it seems this abandonment was protested. It is certain the Popham interest in the colonial adventure did not concur in the Gilbert movement. Sir Francis withdrew his father's ships and interest from the corporation, and put them in service on the same coast in the fur trade and fisheries, out of which a "Port" was created and opened at

Pemaquid; and of such influence, importance and extent, that the great historian of our colonial life in New England, Strachy, recorded "that to the north in the height of (lat.) 44° lyeth the country of Pemaquid: — A kingdom wherein our western colony upon the Sagadahoc was some time settled."

History so connects Pemaquid and Sagadahoc in the Popham colonial planting of English life, law, and civilization here and within the ancient jurisdictional limits of Lincoln Bar.

The settlements were of the same colonial parentage; we must now turn to Pemaquid in further search of colonial court procedure.

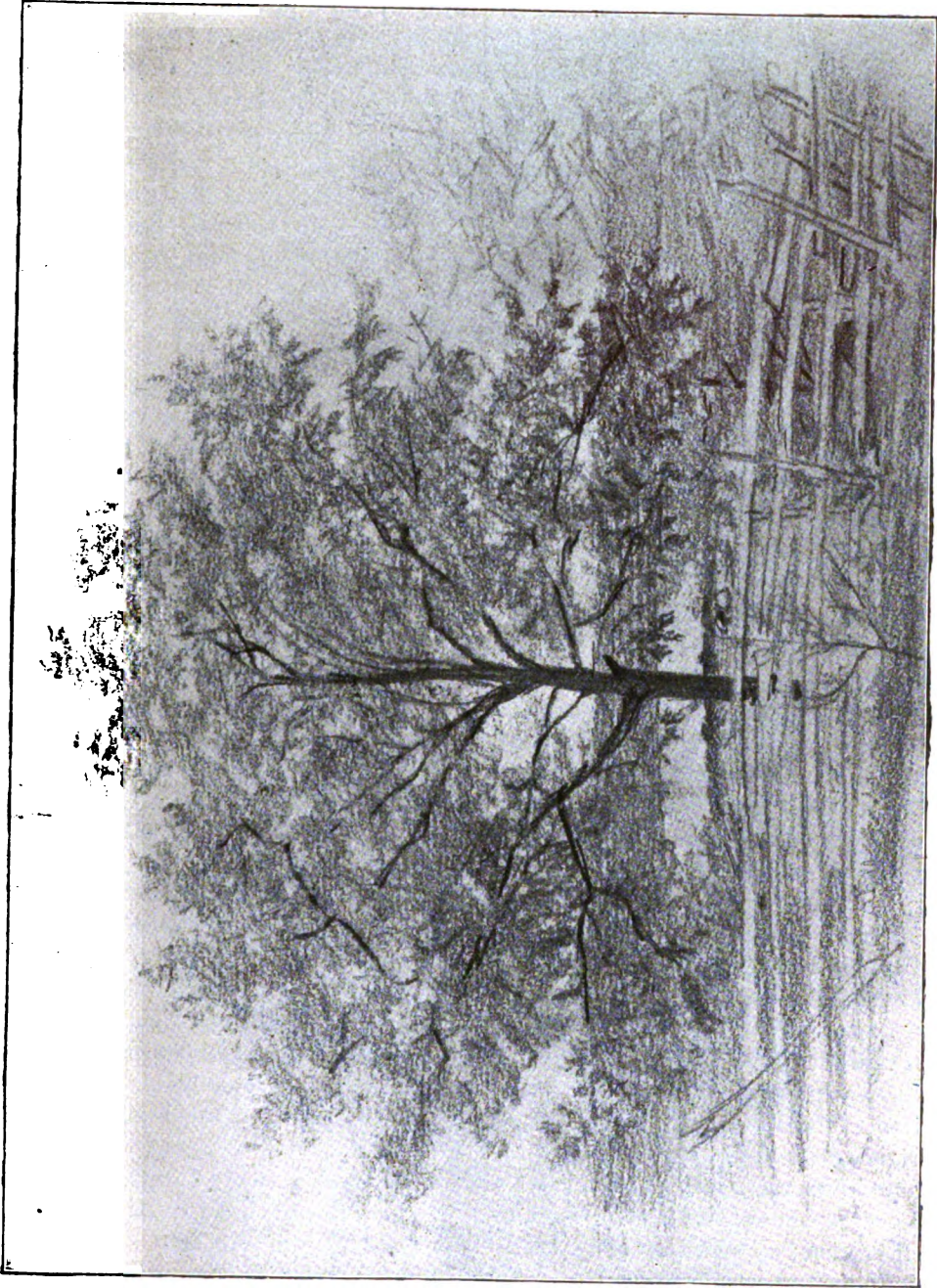
Prior to 1625, the Popham interest at Pemaquid had grown to an expansion as well as a concentration of commercial industries, absorbing the entire trade of Indian peltries on the main; and population had increased at and about Popham's "Port," described on John Smith's great map of New England, and sketched at the head of John's Bay, named "St. Johnstown," so that land had become valuable for speculative purchase.

In 1614, when Smith made his surveys from Monhegan Island, for the great map of New England, he found the Popham "Port" and describes and sketches it at the head of John's Bay; and gave it the name of "St. John's Town." Here one John Brown, a mason, had settled, and began the purchase of large bodies of land, under Indian titles, "Sa-ma-a-set"¹ the "Lord of Pemaquid," favored Brown's greed for land. Popham's port of "St. Johnstown," had now become "New Harbor," in the annals of the day.

Robert Aldworth, mayor of the city of Bristol, England, had established a trade plantation at the mouth of Pemaquid River, and transferred a branch of the mercantile firm of Aldworth & Elbridge, of that city,

¹ M. Historical Collection, vol. 5, pp. 168, 186, *Samosset of Plymouth History*.

¹ Smith, *Mass. Hist. Soc.* vol. 18, p. 115.



PENOBSCOT OAK.

to the west shore of Pemaquid Point, to utilise the harbor trade. Abraham Shurt was the resident agent of the firm, and an English magistrate of the plantation.

Brown, Sa-ma-a-set, Ungoit (probably Samosset's wife), and Shurt here executed the first deed of a great land deal, with the neat, compact formulary of acknowledgement still used in New England, of which Abraham Shurt was the author, and probably used a formulary of the common law of England, as follows, viz: "July 24, 1626, Captain John Samoset and Ungoit, Indian Sagamores, personally appeared, and acknowledged this instrument to be their act and deed at Pemaquid, before me, Abraham Shurt." This is the only record of a formal legal transaction, with the implied existence of a magistrates' court and record, earliest in the Pemaquid section of the Sagadahoc colonial settlement.

In 1631, the Aldworth and Elbridge Plantation had grown to the importance of an emigrant depot, with a ship of 240 tons, sixteen guns, in current trade with Bristol, England, called the "Angel Gabriel," unfortunately driven ashore and wrecked in the harbor of Pemaquid in an August gale, 1635. The business expansion of this harbor site had reached the sea-island dependencies of Monhegan and Damariscove and a proprietor's court was organized and held there, of which Thomas Elbridge was the judge, to which the inhabitants of these islands (and no doubt the neighboring mainland communities) resorted for redress of legal grievances.

We have yet found no records of this court extant. Its charter privileges and scope of civil rights are found in the Pemaquid patent, granted Feb. 29, 1631. A census of the year preceding shows eighty-four families, besides fishermen, appurtenant to this plantation.¹ Indeed this Pemaquid settlement was larger and more important than the capital of Canada.² The bill of civil rights

to the people of Pemaquid recites its issue was made with a view to "replenish the desert with a people governed by law and magistrates!" It authorized a democracy in scope and practice as perfect as that of this day, of which our existing concessions of civil rights, we think, are offshoots.

The principle of a majority rule was set in the machinery of civil power at Pemaquid. "From time to time (it was declared) the people may establish such laws and ordinances for government, and by such officer and officers as most voices shall elect and choose."¹

Such were the principles of civil right and law, laid as the basis of legal enforcement and adjudication of the proprietors court at Pemaquid till Sept. 5, 1665.

On the twelfth of March, 1664, the great fishing plantation of Aldworth and Elbridge, and Popham's estate on the east side possessions, were acquired by the Crown of Great Britain, and converted into a ducal province for the Duke of York, under the the style of "Pemaquid and Dependencies."

A new civil organization was created Sept. 5, 1665, by a royal commission at "Sheepscot Falls," which held its sessions at the house of John Mason.

Pemaquid and its dependencies were erected into a county, called Cornwall and two towns as centers of administration of civil affairs were created. The chief or capital embraced the Pemaquid Harbor Plantation, Islands and "New Harbor," the old Popham Port, and named "James Town" of Pemaquid, probably in honor of James, Duke of York, the royal proprietor of the Province.

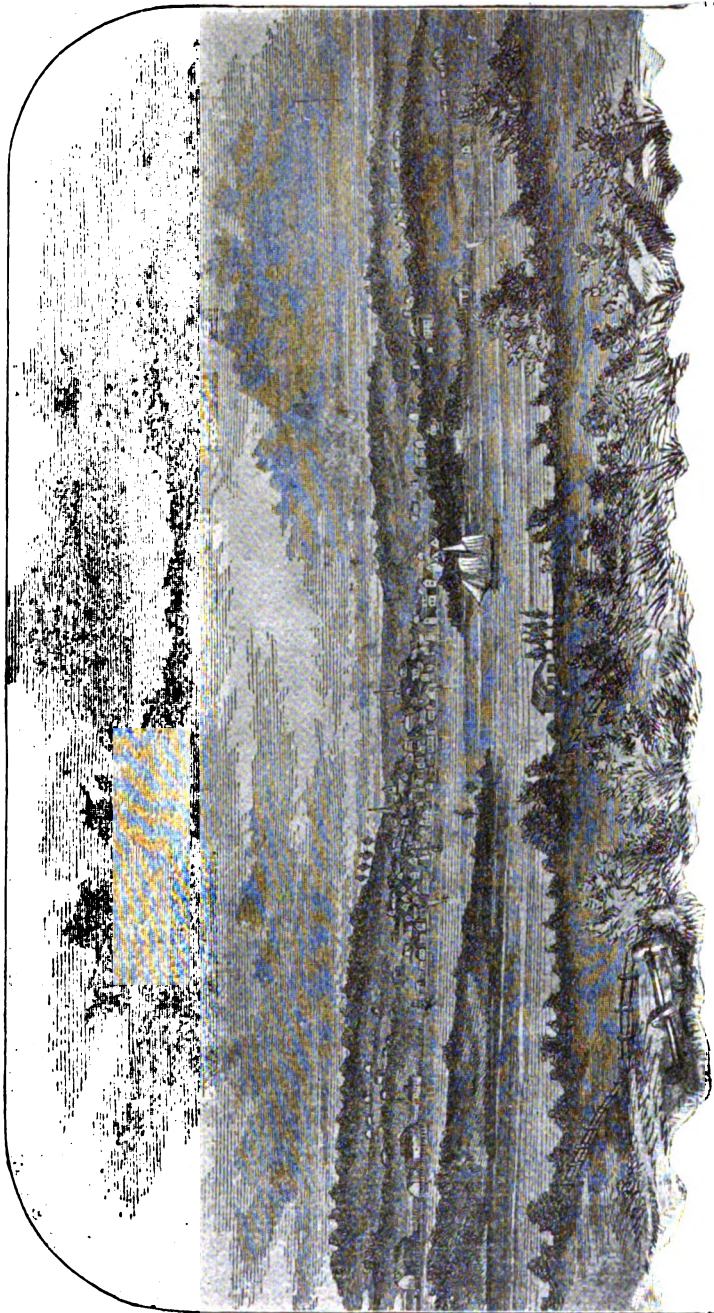
The "Sheepscot Farms," were created a shire town, called "New Dartmouth," probably, from the fact that most of the population were immigrants from Devonshire, and its river "Dart."

A new legal tribunal was organized, called "Court of General Sessions," and

¹ 5th vol. Mass. Hist. Soc. Col., p. 197.

² 5th Vol. Mass. Hist. Soc. Col., p. 196. Thornton.

¹ See Pemaquid Patent.



WISCASSET IN 1858.

made a court of record. Its sittings were held on the last Wednesday of June, and first Wednesday of November. The November session was at Jamestown, where the chief justice resided. The circuit was held at New Dartmouth.

Sullivan says this court had jurisdiction of ecclesiastical affairs. In disagreements of opinion, Chief Justice Jocelyn decided. William Sturt was clerk of court at its Jamestown sessions; and Walter Philips, at the New Dartmouth sessions, who resided in Newcastle, near the bridge.

The records were described "Rolls and acts and orders, passed at sessions, holden in the territories of the Duke of York." John Allen of Sheepscoot was high sheriff. This important record has not yet been found. May it not yet exist among the title papers in the royal family or archives of York in England?

The precepts of this court, with a declaration of claim, authorized a *capias* of the body of respondent. We have notes of one trial for murder at Pemaquid, in November, 1680. Two parties were arraigned, Israel Dymond and John Rashley, for the murder of Samuel Collins, master of a vessel called the *Cumberland*, by drowning him. Of final results, we have no record.

But we have record of this court of the trial of John Seleman of Damariscove in the New Dartmouth shire, Nov. 16, 1686, for assault on the sheriff, and threats of murder of his wife. On plea of not guilty issue was found for the king; Seleman was fined and placed under bonds for future good behavior.

The civil existence of the county of Cornwall was, however, ended in the catastrophes of French and Indian assault upon the capture of Jamestown and fall of Fort Charles of Pemaquid, 1689; collapse of the Stuart dynasty, involving the tragic death of Chief Justice Thomas Giles at Pemaquid Falls, and the capture of his wife and children.

Town and court records, title deeds, and public papers were all scattered and de-

stroyed; the country made desolate and waste. The ancient plantations of the ducal province became solitudes, and so remained till 1716, when Georgetown, embodying the Arrowsic Island resettlements of 1714, was incorporated by Massachusetts and made the shire of a new county called Yorkshire.

Anno Domini, 1728, Samuel Denny, became a citizen of the New Town, and had his Garrison House near the Wates Fort, head of Butler's Cove, where a meeting house stood in a hamlet of some twenty or thirty homesteads. Denny was an educated Englishman, industrious and thriftful, and also a civil magistrate. There he held a court and, it is said, acted as his own bailiff. John Stinson, also, was a Yorkshire magistrate, whose jurisdiction covered Wiscasset, and Jonathan Williamson of Wiscasset was a deputy sheriff. But no court of record existed till the organization of Lincoln county, June 19, 1760.

The interest and influence of the old Plymouth land company fostered the new county development, caused to be incorporated a new town on its lands, called Pownalboro, as a shire town of the new county of Lincoln, and erected a court house and jail on the east bank of the Kennebec, built of hewn timber.

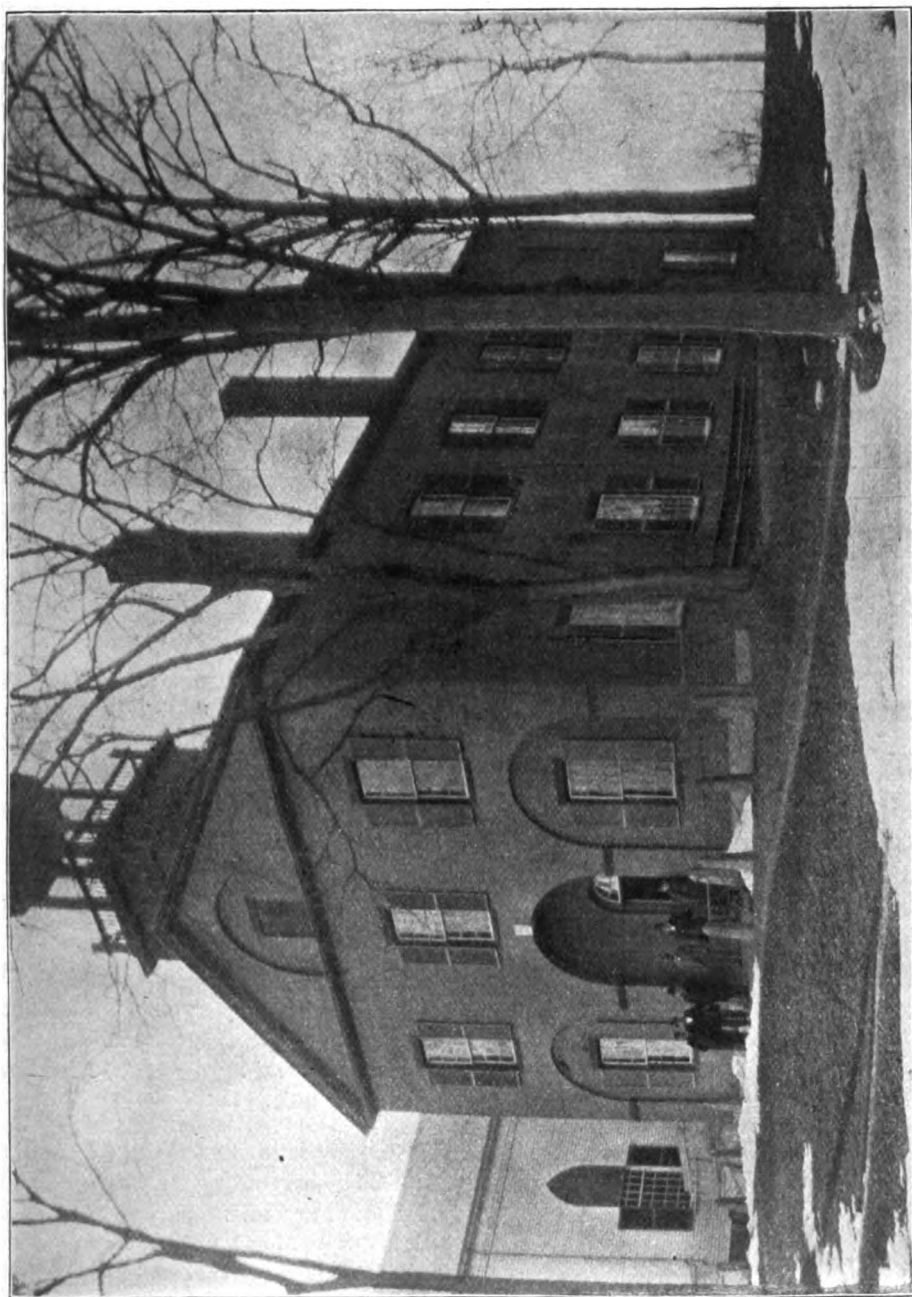
Lincoln succeeded to the jurisdictional territory of old Cornwall, the ducal province of 1664, embracing the kingdom of Pemaquid, of the colonial transactions of 1607.

The organization of a court of record for Lincoln in 1762, laid the foundations of Lincoln bar. The court retained the style of the old Cornwall courts, court of sessions, with sittings in June and September on the second Tuesday.

Samuel Denny, William Lithgow, Aaron Hinckey and John North, were its first judges. Its first session opened as follows viz:

"Lincoln SS.

Anno Regni Regis tirtii, Magnae Brit-



COURT HOUSE, LINCOLN BAR.

ainiae, Franciae et Hiberniae primo": and the first order, declared Jonathan Bowman, clerk; and the next the establishment of a seal, thus: "At his Majesties court of general sessions of the peace at Pownalboro, within and for the county of Lincoln, on the first Tuesday of June, being the first day of the month, A. D., 1762, it was further ordered, that a seal presented by Samuel Denny, Esq., the motto whereof being a cup and three mullets (being the lawful coat of arms of the said Denny's family) with said Denny's name at large in the verge thereof, be accepted, and that it be established to be the common seal of this court."

In 1786, the supreme court of Massachusetts began sessions in the old Pownalboro court house.

In 1794, court holdings were changed from the Kennebec to the Sheepscot Precinct of Pownalboro, at Wiscasset Point, with alternate sittings at Hallowell. Cushing, Sewall, Sargent and Sumner, were justices presiding. The first session of this change had a formal and dignified opening. Three sheriffs in cocked hats, armed with swords and bearing long white staves, marched in procession before the judges, the bar following to the beat of a drum. From then till now, Lincoln bar has worked out the issues of law and justice here, at Wiscasset Point, a site of one of the old Sheepscot Farms granted by Governor Dougan, a governor of Pemaquid and dependencies of the old ducal province of 1664.

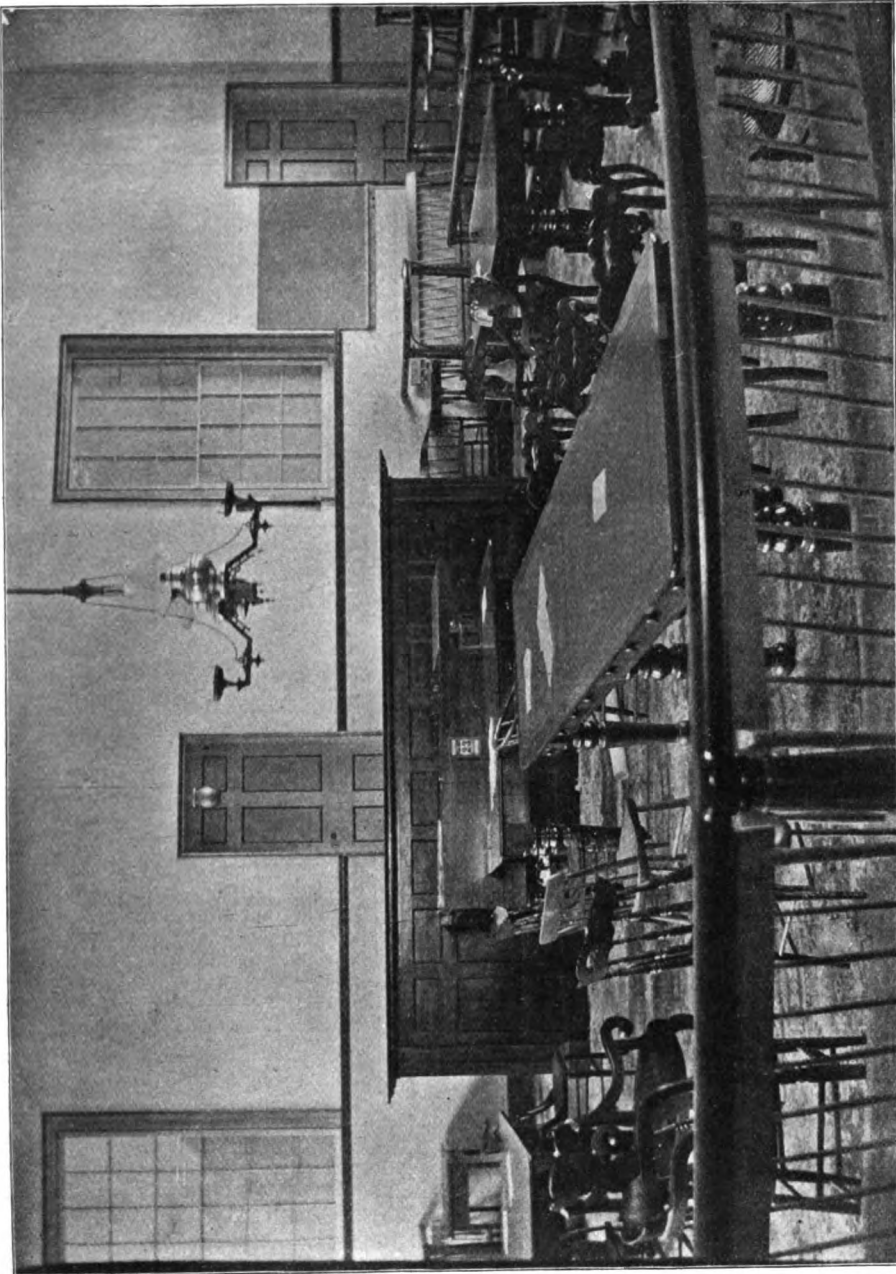
THE CLIMAX.

CLOSE OF THE ACORN TERM. — THE FAREWELL.

The planting a baby oak on the court-house lawn at Wiscasset, and an evening banquet, in honor of Chief Justice Peters, were the concluding exercises of the occasion. A thrifty three-foot sprout from the Penobscot Oak, had been carefully selected, prepared and nursed for the occasion by the Lincoln bar, to be set out and fostered as the "Peters Oak."

During the court recess of Friday the third of November, 1899, the bar gathered at the place of planting. Headed and led by the Wiscasset Cornet Band, the youth from the Wiscasset academy, the children of the grammar schools and primary departments of the village, and their teachers, two hundred strong, marched in procession to the planting ground, and formed a hollow square about the bar members and the little tree. George B. Sawyer, Esq., set the sprout with a new spade, cheered by cadences of appropriate strains of soft music from the band. He also explained the novel scene. William H. Hilton, Esq., formally dedicated the little tree as the "Peters Oak," as the president and in behalf of the Lincoln bar; whereupon R. K. Sewall, Esq., moved that the transaction be entered of record on the bar registry, which was adopted. R. S. Partridge, Esq., made a spirited address of thanks to the school children for their sympathy and aid, and in eulogy of the honored chief justice; and the whole closed with the song of "America," and three cheers for the Chief. At 9 o'clock, P.M., the banquet at the Hilton House was opened. There were a dozen courses. "The brains and fame of the State of Maine were there," to participate in the quiet heartfelt farewell of Lincoln bar to the justice. Most of the associate justices of the Supreme Court of Maine added to the eminence of the occasion, with the United States senator, Eugene Hale. The post prandial exercises were opened by President Hilton, in a brief appropriate address of welcome, as follows: —

BRETHREN AND FRIENDS: — In behalf of Lincoln bar it affords me great pleasure to extend to you cordial greeting. We are glad to find you within our borders; we are happy to meet you around this board. It is well that we should occasionally lay aside the cares and perplexities incident to our profession and cultivate the social side of life. While your neighborly, brotherly and social qualities are universally recognized, yet it is well known and understood that a special purpose



LINCOLN BAR COURT ROOM OF ACORN TERMS.

prompts us to gather here this evening. We have assembled to do honor to our worthy Chief. We wish to demonstrate and emphasize our profound respect and affection for him.

I have always believed and have often declared that, in my judgment, the highest attainment to which a man may aspire is, that after a long, useful and successful business career, with a mind richly stored with knowledge, and a heart full of kindness, and a personality radiating warm sunshine, he shall in the afternoon of life become a living magnet, drawing to and around him not only men, but children, who will delight in his companionship and in his entertaining and instructive conversation. Very like such a man is our distinguished guest, Chief Justice Peters.

Brethren: Salute your Chief. I propose the health of Chief Justice John A. Peters, with the hope that many years of usefulness, content and happiness may be added to the years already so well spent.

His honor was greeted by a standing recognition of the propriety of the toast, and rising said in reply:—

"I thank you for this dinner and this assembly of friends. As you all know, I am about to retire from the bench of Maine. I am proud to say, I am doing it while I have mind and sense enough to know what I am doing. I have always been fascinated by old Lincoln, and held more terms of court there than in any other county in this State, except, possibly, Penobscot. Lamb has said on a like testimonial it 'was like passing from life into eternity.' Well, I am not ready for eternity; and I do not believe that eternity is ready for me. But I have a sort of indescribable feeling of being buried alive, in thus taking leave of my duties on the bench. Yet I tell you, gentlemen, if I am to be buried alive, I would rather be buried in old Lincoln county than anywhere else in the world!

"An eastern monarch offered a reward for a new pleasure. Were he alive to-day, that sought for pleasure would be his, were he to come to old Wiscasset . . . stroll to the quiet old court house . . . ramble across the long bridge to the island . . . and bring up under the old oak 'Penobscot.'"

The toast master for the occasion was R. S. Partridge, Esq., who introduced the bar

speeches by proposing "Lincoln Bar, the Mother of Counties," and called for R. K. Sewall, Esq., who responded as follows:—

May it please the court, members of the bar and gentlemen of the jurisprudence of Maine: As I rise to answer this call, I am deeply impressed, almost startled, with the fact, that we are standing on this occasion among the centuries, making history, at work on a capstone of a new niche, as a climax in the life of Lincoln bar, if not in the jurisprudence of our State!

I am given the motherhood of Lincoln as a theme. "*Mother!*" Who does not appreciate its import? The word is itself an epitome of all that is true and tender in affection, faithful in nurture, enduring in sympathy, in humanity! Mother! It suggests a look into the cradle, at the infancy of law within the ancient jurisdictional territory of Lincoln bar.

On the twentieth of August, 1607, was organized the first court of record, with a seal and marshal, in New England, and within the jurisdictional precincts of Lincoln bar of old, under royal charter dated April 10, 1606, drawn up by the chief justice of the bar of England, to plant the soil of New England with the privileges and principles of the common law of England, as a colonising factor. The procedure of the administration whereof Lincoln bar was representative, has reached a climax this term of court. Having brought forward the skeleton of legal procedure and principles of colonial antecedents of the jurisdictional territory of Lincoln bar, to be crowned with memorial symbols; shall it be with oak?

Hark! Is it a song of echoing centuries?

On the banks of the Sheepscot near the old fort, Chief Justice Peters was caught in an oak.

Not like Absalom by the hair of his head,

But in toils of beauty and strength it is said.

This oak responsive to the judicial caress

Put out its fronds with a view to impress
A due sense of gratitude and promised fruit.

Acorns soon fell in copious showers

To win the judge from all other bowers.

And give a new name to judicial sitting,

A name in fact of rural fitting.

So we have it now in full, and firm

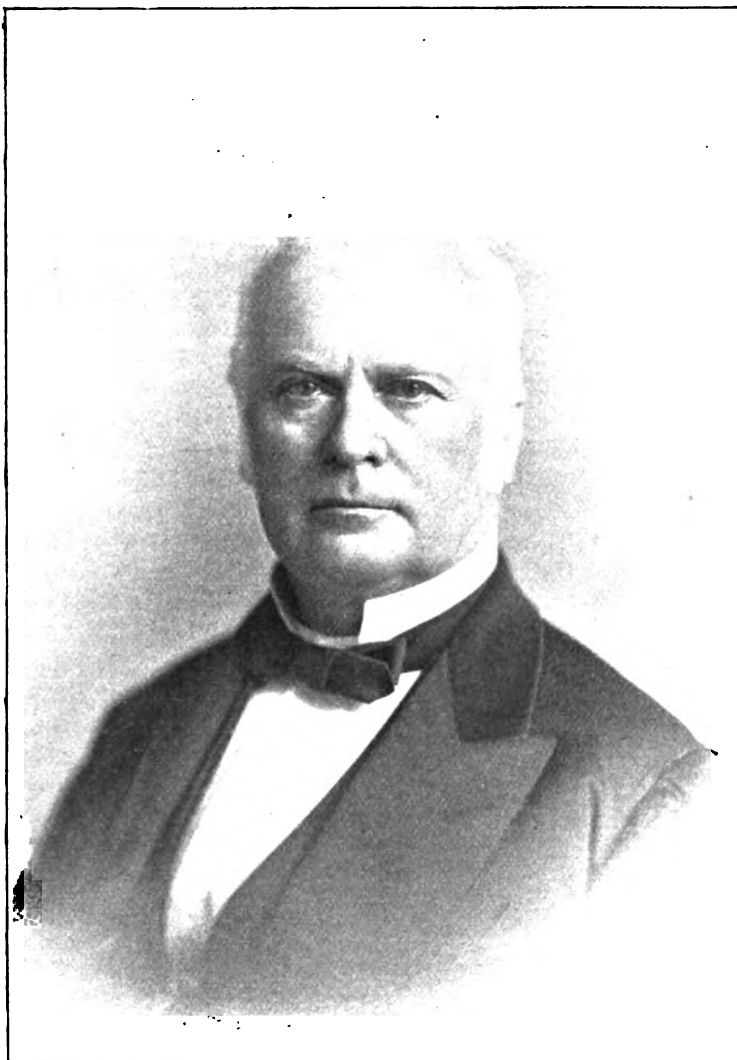
Our Chief Justice Peters' "Acorn Term."

The oak and its acorns have blocked the way,

To close a term with a gala day:

Not with Longfellow hanging his crane.
Illustrative of life's domestic train :
Nor yet with fronds of the old tree top,
But the hanging of an acorn drop.
Or if preferred, you soon shall see
Memorial hidings in a junior tree:

pure spring water of the old town ; also, of its rural environments. The labors of the day suggested recreation and exercise, by rambling in the woods, and extensive walks. Lured by the long bridge to quaff refreshing sea airs across the Sheepscot tides, and to revel in the scenic beau-



JOHN A. PETERS.

And that none shall ever doubt or croak
It's a scion true of the "Penobscot Oak" !

The story we will give in a summary of this judicial finding.

In his service on the bench of Lincoln bar, at Wiscasset, his honor became enamored of the

ties of landscape and forest attractions of "Folly Island," the site of the ancient military defenses of Wiscasset Harbor and the heart of Maine as well, the island still pitted with earthworks frowning over the narrows, and through the port-holes of the gun deck of a wooden castle, known as

the "block house," the judge encountered an oak tree of remarkable features. It excited interest and commanded admiration. Members of the bar were wont to share his honor's athletic perambulations.

It was the October term of Lincoln bar, A. D. 1873, and Wales Hubbard and Hiram Bliss, Esqs., were with the judge at the oak finding of the court. It was a beautiful October afternoon, the party came upon the tree. There was no court reporter there. The sight of the tree arrested the party, striking them with awe and the judge with inspiration.

In its proportions, the tree seemed majestic : not so exceptionally tall as it was massive and heavy. Its wide-spreading branches were large and ponderous.

The character of its fruit was matter of admiration, and won marked attention of all as it lay spread on the ground. Its acorns were then and are now the largest ever seen in Maine. Every nut picked in season, is thoroughly sound and handsome in shape : shells smooth as if varnished, and almost uniformly exact in size with each other.

There was then no evidence the place where the tree stood had been frequented. It appeared a stranger to humanity.

Its site is one of the most picturesque spots on the river or bay. This judicial tramp had been one of discovery. The discovery called for a name. What should the tree be called? The discussion suggested a variety of names. The judge was in doubt. He thought the most appropriate name would be "Neal Dow Oak," because it drank nothing but water and takes any quantity of that! Finally the problem was solved in a call for "Penobscot"; and Penobscot Oak has ever since attached. It has been the charm of the venerable chief justice's October term, for years; and this term he has been wont to call "Acorn Term."

In the plenitude of his inspiration, the judge has profoundly and instructively soliloquized, ravished with visions of psychological novelties, in possible virtues of vegetable life in his favorite oak, he asks, "Has it sensation, or the function of thought?"

His answer, "Certainly! anything that is alive, has sensation to a degree. This monarch looks as if it might know something! It can

adapt itself to storms and wind. It is said the difference between man and the grades of animal life below, is, that while animals may be conscious they do not know they are conscious, but man is conscious that he is conscious.

"So vegetation in the form of a huge oak, may have consciousness. Who knows?

"This great tree has likewise in form and shape its twists and turns, its straightness and crooks, its upward slopes and downward declensions, its vigor and weakness, its beauties and deformities, like to many a human being, illustrative of character, mentally and bodily. Most any character, from the judge on the bench himself, to the court crier, or janitor of court room where the judge sits, may be found in the multifarious limbs of this great oak tree! And there, innumerable, are both beauties and deformities yet to be discovered in the manifold branches thereof, illustrative of human character through the imagination of the philosophic humorist and investigator."

Such lessons are the judicial suggestion of the find of a Penobscot oak on the Sheepscot, in a niche of the history of Lincoln bar.

CONCLUSION.

But the oak has a history as a memorial. In vegetation it is the forest king. In industrial hands, it is the strongest rib of the builder's art. In the annals of humanity, it has been the hiding place of precious memories: a beacon light to retrospection: a charm to sacred association, a symbol to inspiration of immortality!

This forest king to the Roman was "Quercus," and to the Greek "Druis." Near two thousand years before Christ, and more than thirty-six hundred years ago, an oak stood a memorial factor to the family of Jacob, the Hebrew, a monument of fraternal goodwill, in a family jar; and was made a memorial of the purgation of his household of heathenism.

The strange gods of his family — "their earrings" and trappings of idolatry, offensive to the conscience of the old patriarch — "he hid under an oak of Shechem." This endowed it with a religious character, and so made the oak a hiding place from sin in aid of reformation.

The dead nurse of Jacob's mother was buried under an oak to mark the spot as a "place of weeping," and so made it a memorial of departed worth and keepsake of affectionate regard.

But the oak has been used to have legal matters in memorial keeping. Joshua, the great Hebrew captain, during the Canaanitish wars, codified rules of government for his nomadic race; and when he had written up the book of the law of the Lord, he took a great stone and set it up under an oak. (Jos. xxiv. 26.)

The stone and the oak were used as memorials of a legal crisis in the nation, viz: *codification of its laws*. Gideon too, in a crucial stage of servitude of the Hebrew race, in seeking divine relief, met God under an "oak of Ophra."

These facts show the early eminence of the oak, in use for memorial service, in the dawn of civilization. Hallowed memories were its secrets.

The oak in history appears to hold no mean distinction as a memorial of beneficent events in society, worthy of perpetuity.

Its robust durability is suggestive of fitness for memorial uses. It has therefore been built into human history as a rib of perpetuity of affectionate and sacred reminiscences.

Humanity has voiced the idea of immortality; and in the oak, in the idealism of nature, to our Saxon fathers, its symbol.

The Druids of Britain hung their memories of the past, as well as hopes of the future, on the oak in the tree tops of sacred groves.

Is it not fit, therefore, that the bar of old Lincoln, crowned with hoary memories of the colonial local civil life of New England of near three centuries, — the successor of old Cornwall in

its jurisdictional service of the common law of England; should take the oak as its memorial keepsake and adopt the family of the Penobscot oak (a loan from the Sheepscot), and make it a living symbol of the service of the venerable chief justice of the bench and bar of Maine?

Shall we not adopt its scion, or acorn, in perpetuity of the respect and affection of Lincoln bar, for our honored chief justice of the judiciary of Maine, John A. Peters, of Bangor, whose "acorn terms" have so honored and adorned our bar?

Shall we not hold these living symbols in perpetuity of his services to society and civilization (and of partiality to our bar), of the green old age of our venerable chief, and in memorial of a useful life, in conserving the peace and good order of society, the stability of our civilization, the eminence of Maine, in a wise and just jurisprudence and adornment of her bench with decisions of law, of merit and sense?

To Lincoln bar it will be a crown of honor that the honored chief of the judiciary of Maine has made it the sittings of the "acorn terms" of his court, and so given it a place in the niche of the legal history of New England; and the name of Peters a worthy place in the crowning eminence of the grand old past of Lincoln county.

Now, gentlemen, with an apology for the use of your time and patience — and of the thunder of the chief justice, to get the lightning for this occasion, — I take my leave of the motherhood of Lincoln bar.



LEAVES FROM AN ENGLISH SOLICITOR'S NOTE BOOK.

IV.

"LATET ANGUIS IN HERBÂ." A STORY OF INNOCENT PARTICIPATION IN CRIME.

BY BAXTER BORRET.

I WAS sitting in my office in London one morning about the end of the "sixties," two years before I left the Metropolis to settle down in Georgetown, when I was disturbed from my work by my clerk announcing to me that a gentleman, who would not give his name, wanted to see me. A tall man of about thirty-five, rather good-looking, but somewhat dissipated in appearance, and close-shaven, came into the room and handed me a card on which was written, not printed, Mr. Neil Angus, 422 Oxford Square, Hyde Park; he said he called on me without a letter of introduction, that my name had been mentioned to him by a firm of stock-brokers, who had offices in the same block of buildings, and who, though not knowing me personally, had said they had heard me well spoken of as active, industrious, prompt, and painstaking. I bowed my head in acknowledgment of this pleasant compliment, and asked in what way he wanted me to serve him.

He then told me that his father was a Scotch gentleman, a Colonel Angus, who had rather recently settled in London, after living abroad for many years, and that he had had a sudden paralytic seizure, which his medical man had warned him was liable to be followed at any time by another, and that he should lose no time in getting his affairs in order; Mr. Neil Angus then explained that his father had never made any will since his wife had died abroad, and that he wanted a short will drawn up at once. I expressed my willingness to undertake the task at once, but said that in such a delicate matter as will-drawing I could only take my instructions at first-hand, from the testator himself; but that I was prepared at once to

accompany him to his father's house if wanted; to this he somewhat demurred, feeling (as he said) that it was undesirable for a stranger to visit a sick man without preparation, but he asked me whether I would put other engagements on one side, and call at 422 Oxford Square that evening, at eight o'clock, bringing a clerk with me who could write out the will and then act as one of the witnesses. Before we parted I asked my visitor to give me the small details which I should require to enable me to draw the will, with the view of saving trouble to the testator and shortening my interview with him, such as his full name and his rank in the army, etc.; and I learned from him that Colonel Angus was a widower, that my visitor was the only son, that the only daughter had married a gentleman named Alexander Caryl, who was then living at a small seaport town of Devonshire, and was by profession an artist and landscape painter, with whom Colonel Angus was on most affectionate terms; that the daughter had recently died and had left no family. I also was informed by my visitor that Colonel Angus was lieutenant of some Scotch estates of considerable value which were entailed on his son, my visitor, and therefore did not need to be dealt with by the will; and that his only other property was personal estate invested in English securities, and the lease and furniture of his house in Oxford Square; a very plain, straightforward story.

Punctual to my appointment, accompanied by my faithful clerk, George Carter, I knocked at the door of the house in Oxford Square, which was at once opened by my visitor of the morning, who apologized for the absence of any servant by saying that the old

housekeeper, who acted as nurse, and sat up at night with his father, had gone out for a walk before taking her place in the sick-room for the night. I left George Carter in one of the sitting-rooms downstairs, and proceeded to the colonel's bedroom, accompanied by my visitor of the morning, who introduced me to the colonel, and I then desired that he and I should be left alone, a request which was (somewhat ungraciously as I thought) complied with.

The sick man lay very still in the bed, and spoke in very low tones, and said he feared he had received his summons to the next world, and was anxious to make a will in favor of his son-in-law, who, by his daughter's death might (he thought) be left unprovided for if he, the sick man, died without a will. He then told me the same story that my visitor of the morning had previously told me; of the Scotch settled estate that needed no mention in the will, but would form an ample provision for his only son, and that he wished to leave a legacy of £7000, which (he said), represented about one-half of the value of his personal estate, to his son-in-law, Alexander Caryl, and the residue, including the house and furniture to his son; and he said he wished his son-in-law Caryl to be the sole executor. I felt it only right to point out to the testator that it was casting a slur on his only son, not to appoint him one of the executors, and after some little grumbling he fell in with my view, and I then proceeded further to point out that it would be prudent to settle the legacy given to the son-in-law, so as to give him a life interest only in the capital, and provide for the corpus passing over to his only son in the event of Caryl's marrying again, as it seemed to me rather hard upon the only son, that his father's money might in the course of a short time go to endow the second wife of a son-in-law. At this the old man got somewhat angry, and told me rather curtly to carry out his instructions, and not to dictate to him what his duty was

as between his son, and his son-in-law. To soften the old man's wrath, and in fear of any outburst of anger bringing on fatal consequences, I decided not to argue the point any further but to draw the will as instructed, but I extracted a promise from the sick man that he would reconsider my suggestion, and send for me if he thought it prudent on second thoughts to make any alteration.

After this I summoned up the son to take his place at the sick man's bedside whilst I proceeded to put the will into proper shape, and get it copied by George Carter. This did not take long; and shortly after ten o'clock Carter and I went up to the sick man's room, read the will over to him, with which he expressed himself satisfied. I then called his son into the room, the sick man was raised up in his bed, and with some difficulty we placed him in such a posture that he could sign the will. He took a long time and very great care about the signature; Carter and I added our names as witnesses; and at the sick man's request I placed the will, folded in a sealed envelope, under his pillow. Before leaving him, I added a few earnest words, which no one else could hear, urging him to reconsider the advisability of settling his son-in-law's legacy, so that, in case of his marrying a second time, his own son and his family, if any, should have the reversion of the legacy; and I again promised to hold myself ready to come to him again at any moment he might summon me to make this or any other alteration he might desire.

Before I left the house his son paid me a very liberal fee for the work I had done, thanking me for my promptness and expedition in carrying out his father's wishes.

I pause here to ask any fair-minded reader of this story whether he can find any fault or flaw in my conduct throughout this matter. Yet the next few weeks convinced me, to my own confusion, that I had been made an instrument (though an unconscious, and certainly an innocent one) in the concoction

tion of what might have turned out to be a most dastardly fraud.

Six weeks after the events above recorded, I received a call from a solicitor named Lawson, a man of the first standing in the city of London, who produced the will, and asked me if my signature attached to it as one attesting witness, and the signature of George Carter as the other witness, were genuine. Of course I at once replied in the affirmative. He then told me that he had acted for some years as Colonel Angus' legal adviser; that some strange mistake, if not worse, must have occurred, as Colonel Angus declared that he had never seen me in his life, still less had he ever given me any instructions for any will; moreover, he was absent from London at the date of the document, and he thought I ought to take the earliest possible opportunity of explaining the part I had taken in the transaction. After pausing for a moment to consider my position in all its bearings, I summoned Carter into the room, and in Mr. Lawson's presence told him to go with Mr. Lawson into the waiting-room, and in his presence, but without speaking to him, to put down in writing everything he could recollect bearing upon the matter, without hesitation or reserve, to sign the statement, and put it into a sealed envelope. I left them alone for the purpose, and in my own room I drew up and signed my own statement, placing it also in a sealed cover. I had asked Mr. Lawson to send a special message asking Colonel Angus and his son (whom I looked upon as implicated in the matter) to meet us at Mr. Lawson's an hour or so later on; and I stipulated that the two statements should not be opened or read or compared except in Colonel Angus' presence. I had my reasons for all this. My suggestions were acted on. Mr. Lawson and I went over to his office, where we met Colonel Angus and his son. As a preliminary I asked Mr. Lawson to identify Colonel Angus, which he did, also to identify the

son, as Colonel Angus' only son; this also was done by both Colonel Angus and Mr. Lawson. I then said: "My course is now clear; I never saw either Colonel Angus or his son before; I owe no duty of professional confidence to any one;" and I asked Mr. Lawson to break the seals of both envelopes, and read and compare the two statements, whilst I retired from the room. In the meantime Carter rejoined us, and he, too, stated that he had never seen either Colonel Angus or his son before, and this was added to his signed statement. It appeared that our two statements (as might have been expected) were completely identical; and with this valuable signed evidence in his hands, I felt I had done all I could for Mr. Lawson's purposes, whatever they might be, and that my own character, also, was cleared. The rest I must leave to Mr. Lawson. He might advise Colonel Angus to carry the matter further, or to say nothing more about it; that was within his province, not mine, and there I left it. If the suspicion of all parties was directed against the same person as the probable author of the conspiracy, we kept our thoughts to ourselves, by a sort of tacit understanding.

I may mention, however, that before I left his office, Mr. Lawson told me, in answer to a question of mine, that the forged will had been sent to Colonel Angus' bankers the day after it was signed, with a letter asking the bankers to place it in Colonel Angus' tin box of securities, the signature to the letter being also a very skillful forgery of Colonel Angus' handwriting.

Two years afterwards, before leaving London to settle down in Georgetown, I called on Mr. Lawson on a matter of business personal to myself; and he then gave me the clue to the whole story, which probably my readers have already unravelled. The prime mover in the conspiracy was Alexander Caryl. His death unlocked Mr. Lawson's lips. He was no landscape painter, but a

gambling horsedealer, who had years before persuaded Colonel Angus' daughter to elope with him, and had broken her heart by ill-treatment and driven her to an early grave. Two boys born of the marriage were from the time of their mother's death maintained and educated by Colonel Angus, who had taken steps to have their father removed from their guardianship, and made them wards of the Court of Chancery, with Colonel Angus and his son as joint guardians.

There were traces of great skill and cunning on the part of Caryl throughout the whole matter. Colonel Angus had really had a slight stroke, and his life was a very precarious one, and Caryl knew it; he also knew of the absence of the colonel and his son at Brighton, by the doctor's orders, at the time I drew the will; and his fertile brain conceived the plot of personating Neil Angus, and of calling on me, then a young and inexperienced solicitor, of whom he had heard through some outside stock-broker's clerk, and he had an accomplice at hand in the person of another black-leg turfite, who had at one time been a travelling actor, and had served time for a previous forgery.

This man was easily induced to study Colonel Angus' handwriting, and to act the part of the sick testator to the life. But a feeling of respect for the memory of his dead daughter, and a desire to protect the name of his grandsons from being mixed up in the shameful business, led Colonel Angus to forbear to prosecute his son-in-law, who died a few weeks before the death of the old colonel himself.

My story is ended; but I can never be too thankful that I was enabled to take part in frustrating the conspiracy, so cleverly plotted, during Colonel Angus' lifetime, and before the occurrence of his death had rendered the matter one of public concern. As for my own part in the drama, I leave my readers to blame me as much as they may think I may deserve it. I am older now, and probably I should be slower about preparing a will for an unknown man; but, save for this, I think the course I adopted throughout was what any other young lawyer in my position would have adopted, without suspecting the presence of a snake in the verdant herbage.

CHAPTERS FROM THE BIBLICAL LAW.

By DAVID WERNER AMRAM.

II.

THE PURCHASE OF THE CAVE OF MACHPELAH.

THE twenty-third chapter of Genesis contains the record of an ancient conveyance of land, differing materially in form from the methods of conveyance familiar to us in modern times, yet possessing characteristics similar to those of the Roman and the Common Law. The old forms of procedure here recorded are the groundwork upon which modern systems have been estab-

lished. They speak of the days when tribal ownership of land was still in force, when written records were not, and when the public assembly, the town or village council of elders, was required to sanction the legal act of conveyance.

In those days formality was greater than in our times, for it was only by the observance of great formality that rights and obli-

gations could be established beyond question. Since there were no records, the memory of the witnesses to the transaction was relied upon and, in order to impress the matter indelibly upon their minds, there arose the long and complicated formalities common to all ancient systems of jurisprudence. Some of these formalities were made necessary by the religious element that entered into every transaction. This is notably the case with certain symbolic acts at Roman law, and there is ample evidence of such cases in the Bible also; but in the conveyance of the land to Abraham which is under consideration, the formalities seem to have no religious aspect whatever. It was simply an ordinary business transaction, attended by the proper legal formalities. Abraham, the nomadic Hebrew chieftain, had wandered into the neighborhood of Hebron, a city well known in later times in Jewish history, but at that time belonging to the Hittites, the "sons of Heth." Some famous modern Biblical critics deny that the Hittites were at that time the owners of this territory, but their arguments are not in place here. We shall take the Biblical text as we find it, for it makes little difference to us whether the legal formalities there recorded, were Hittite or Amorite. With Abraham, were his wife Sarah, his children, his cattle and his slaves, the entire *familia* of the patriarch. "And Sarah was a hundred and twenty-seven years old; these were the years of the life of Sarah. And Sarah died in Kirjath Arba, the same is Hebron in the land of Canaan: and Abraham came to mourn for Sarah and to weep for her. And Abraham stood up from before his dead," and went down to the gate of the city where the town council of the Hittites was in session. There the elders of the Hittites, the "people of the land" in the most public place, and in the presence of all who came and went through the forum at the city gate, transacted the public business of their community. Abraham was

recognized by them as a distinguished chieftain not of their tribe, temporarily dwelling within their tribal domain, and was accorded the honor of a seat in the midst of their assembly. A favorable opportunity during the session of the council having presented itself to Abraham, he addressed them "and spoke unto the sons of Heth, saying, I am a stranger and a sojourner with you; give me a possession of a burying-place with you, that I may bury my dead out of my sight." Abraham being an alien, could not acquire property rights in land without the consent of the people. Land was tribal property, held and used, it is true, in severalty by the members of the tribe, but inalienable, especially to a stranger, except by common consent given by the tribal council. Our land laws, restricting the right of aliens to acquire real estate, are survivals of the days when the alien was, *ipso facto*, an enemy, and could not be permitted to settle permanently, until the people had given their consent. It was to the people, therefore, and not to any individual that Abraham addressed himself.

"And the sons of Heth answered Abraham, saying unto him, *Hearken unto us*, my lord: thou art a mighty prince among us; in the choice of our sepulchres bury thy dead; none of us shall withhold from thee his sepulchre, so that thou mayest bury thy dead. And Abraham stood up, and bowed himself to the people of the land, to the sons of Heth. And he spoke to them, saying, If it be your mind that I should bury my dead out of my sight, hearken unto me, and entreat for me to Ephron the son of Zohar, that he may give me the cave of Machpelah, which he hath, which is in the end of his field."

Abraham had selected the place that he desired to have, and he knew that the owner was there among the members of the council, but the formalities of the occasion prevented him from addressing his request to Ephron personally. It will be noted that

his first request and the answer of the council contained no intimation of his intention to purchase the place for money. This is usually attributed to the politeness of the parties concerned. But it was not mere politeness that governed the formalities of this occasion. It seems rather to have been the formal way of striking a bargain in those days, by question and answer, until the final consummation of the matter, by acceptance of the last offer. And the absence of the price in the opening phrases, the offer to give the land without price, the counter-offer insisting upon payment, and the final mentioning of the price casually, as it were, are all part of the regular formal act preliminary to the transfer of the title. The peculiar use of the phrase "hearken unto me," and "hearken unto us" (*oyez*) by each of the parties in making his proposition, or counter-proposition, seems to indicate that they were not used to attract the attention of the person addressed but were formal words necessary to the legality of the transaction, which ended by Abraham "hearkening unto Ephron," i.e. accepting his offer.

Abraham having thus indirectly called upon the prospective grantor of the property to speak, adds, "for as much money as it is worth he shall give it to me for a possession of a burying-place among you. Now Ephron was sitting among the sons of Heth." This is usually translated in the English versions, "Ephron *dwelt* among the sons of Heth." The Hebrew text is properly translated "was sitting." He was one of the council and immediately took up the word when Abraham had concluded. "And Ephron the Hittite answered Abraham in the hearing of the sons of Heth, of all that went in at the gate of his city, saying, Nay my lord *hearken unto me*: the field give I to thee, and the cave that is therein, I give it thee; in the presence of the sons of my people give I it thee, bury thy dead." It is probable that nothing would have disconcerted Ephron so much as to have had Ab-

raham accept his apparently generous offer; and indeed it is likely that had Abraham said, "I accept," it would not have been binding on Ephron, because he had not said, "Without price I give it to thee." The omission of these formal words led Abraham to understand that the land was not to be given without price, and that this important point had yet to be fixed. After this statement of Ephron, "Abraham bowed down himself before the people of the land."

Why? Bible commentators say, out of thankfulness for the generous offer of Ephron. If so, why did he not bow to Ephron? This bow meant to indicate that he was prepared with his next counter-proposition, to be made to Ephron in the presence of the council. The courtesy shown to the judge by the lawyer about to address the jury has in it something akin to the bow of Abraham. Abraham invariably saluted the council before speaking. He arose to make his opening request. The act of arising is in itself an act of courtesy. The council all sat, and he sat in their midst, but when he became a suitor he stood up to address them. Then after they had given their consent to his acquisition of a burial place he again "stood up and bowed," before making his next offer, and, lastly, after Ephron had spoken he again "bowed down," before making his final proposition. "And he spoke unto Ephron in the hearing of the people of the land, saying, But if thou wilt, I pray thee *hearken unto me*; I will give thee money for the field; take it of me, and I will bury my dead there."

Abraham no longer speaks of the cave, or the burial place that he desired, but of the whole field. He wanted a "possession of a burial place." This did not mean merely the six feet of ground required, or even the cave in which the body was interred, but an estate of inheritance, in which the family tomb would be placed and which would be sanctified by the dead buried

there, and made a permanent possession in the family. The grave of the ancestor buried in the family estate, was the strongest evidence that could be adduced to prove title. "And Ephron answered Abraham, saying unto him, My Lord, *hearken unto me*, land worth four hundred shekels of silver; what is that between thee and me? Only bury thy dead." Generous Ephron! — according to the Bible commentators. Four hundred shekels of silver was a fortune in those days, but Ephron apparently speaks of it as a mere bagatelle. But Abraham understood Ephron better than the Biblical commentators understood him. This was the formal hint that the price was fixed and the negotiation about to close. Hence Abraham "hearkened" unto Ephron, or, as it is translated in the Leeser Bible, "Abraham understood the meaning of Ephron." And indeed after Ephron had fixed his price there was nothing more to be said. Abraham produced the silver and "weighed unto Ephron the silver which he had named in the hearing of the sons of Heth, four hundred shekels of silver, current money with the merchant." The weighing was probably done by the public *libripens*, a functionary well known to us through the Roman law. The shekel here mentioned is not a coin but a weight. The word "shekel" means weight. At a later time a certain weight of silver became *the* shekel, the standard weight of money, very much as a certain weight of English gold became *the* pound. The act of weighing and handing over the silver ended the formality and thereby the land became a possession for an inheritance unto Abraham forever.

The chronicler in the book of Genesis was a careful scrivener. In terms which must excite the admiration of the modern conveyancer he describes the transaction:

"And the field of Ephron which was in Machpelah, which was before Mamre, the field and the cave which was therein, and all the trees which were in the field, that were in all the borders round about, were made sure unto Abraham for a possession *in the presence* of the sons of Heth, before all that went in at the gate of his city." Very carefully does the chronicler enumerate the field, the cave, the trees, even all those in all its borders lest any right to fell wood remain in the grantor. All these, he says, were made sure unto Abraham before the public council of the Hittites by whose presence the conveyance was made sure. Thereupon Abraham took possession and exercised his first act of ownership. "And after this Abraham buried Sarah his wife in the cave of the field of Machpelah, before Mamre: the same is Hebron in the land of Canaan." It seems that this record was made long after the event, for the memory of a later generation had to be refreshed by the statement that the place known to them as Hebron had formerly been called Kirjath Arba, which was before Mamre. Both the latter names were merely vague memories of ancient days. The record in the book of Genesis then ends with a clause like a clause of warranty. "And the field and the cave that is therein, *were made sure* unto Abraham for a possession of a burying place *by the sons of Heth*." In the presence of the sons of Heth the formal transfer of Ephron's rights was made, and by them, representing the whole community, the title was made sure unto Abraham. The Hebrew text may be translated "were made sure from the sons of Heth," as though it was the transfer of the title by the tribe rather than that by the individual *terre tenant* that was required to warrant it against all claimants.

THE LIFE OF A CHINESE MANDARIN.

AT two or three o'clock the mandarin shakes himself up, and if business is so moderate that he can afford to postpone the hearing of cases so late, he robes himself and proceeds to the second or third court to sit as judge. Of course, in a busy city, the mandarin has to hurry over his mid-day meal and go without a snooze; as I said before, it all depends upon how many superiors there are "knocking around." The "court" is literally a court; that is to say, it is a courtyard partly or entirely roofed in. The paraphernalia of justice consist of a large table, perhaps ten feet by three, covered with a red cloth, or painted red. On this table are set black and red ink slabs, brushes, and the other usual writing materials, besides a sort of hammer, with which the mandarin occasionally knocks on the table. Behind are what look like "stands of arms," and indeed they are; they are stands containing spears, hatchets, and other strange objects usually carried by lictors. Every one addressing the court, be he plaintiff, defendant, or witness, must kneel; the only exceptions are official personages, or those holding titular rank. There is no limit to the city magistrate's jurisdiction; it extends over all matters, — civil, criminal, political, social, religious. In all cases sentence of death is pronounced by the city magistrate before the matter is taken to a higher court. The mode of procedure is, from our point of view, decidedly undignified. The magistrate speaks in a loud, impatient voice, abuses the accused, asks unfair and leading questions, goes into matters irrelevant to the issue, takes cognizance of hearsay, and, in short, outrages every sentiment of fairness and impartiality. It is beneath the dignity of a mandarin to speak publicly in any but one form or the other of the so-called "mandarin dialects." Hence, in order to maintain his position, an official will go

through the form of having an interpreter for a language — sometimes even his native tongue — he understands perfectly well.

On one occasion I sat as assessor to a Manchu mandarin who spoke Cantonese perfectly. The witnesses were mostly Cantonese, but the mandarin roared out his questions in Pekingese; they were interpreted in a corrupt southern mandarin dialect, through which medium, again, the Cantonese answers were returned. Things went on so unsatisfactorily that I at last conducted the examination myself in Cantonese, and, although the mandarin understood every word that was said, explained it to him in Pekingese. It need hardly be hinted that, what with secretaries, interpreters, taking down written depositions, and total absence of rules of evidence, the chance of obtaining justice is infinitely small where bribery is at work. An attempt to administer rough justice is, however, as often the rule as the exception. There is another safeguard. The Chinese, if unscrupulous, are easy-going, and dislike pushing things too far. Thus, if a gaoler finds he really cannot squeeze any more money out of a prisoner, he usually treats him with reasonable humanity; if a "warrant-holder" has been billeted upon a family and sees clearly that he has ruined them, he generally leaves them enough to re-commence in life. In the same way the family men and gatekeepers, through whom the bribes commonly pass, endeavor not to kill entirely the goose with the golden eggs. Unless political malignity or private spite is aroused, everybody manages to square everybody else, and things jog along pretty well. Still, the *yaméns* have such a villainous reputation that most respectable people prefer to carry their disputes before a family or village tribunal; and if these agree, the law takes no cognizance of any crime whatever except treason against the

state. In fact, the policy of the government was cynically declared sixty years ago by the Emperor Taokwang, who said: "I wish my people to dread the inside of my *yaméns* as much as possible, so that they may learn to settle their quarrels amongst themselves."

Most mandarins pass the whole of their lives without taking a single yard of exercise. The late Nanking viceroy (father of the Marquis Tsêng) was considered a remarkable character because he always walked "one thousand steps a day" in his private garden. Under no circumstances whatever is a mandarin ever seen on foot in his own jurisdiction. Occasionally a popular judge will try to earn a reputation by going out *incognito* at night; but even then he takes a strong guard with him, and (as happened when I was at Canton) gets his head broken if he attempts to pry too closely into abuses. As the police and the thieves are usually co-partners in one concern, it naturally follows that caution must be used in attacking gaming-houses which have bribed themselves into quasi-legality. A mandarin's leisure, which may be said to begin at five P.M. and continue till nine, is spent in one or other of the following ways:

Either he reads poetry by himself, or he sends for his secretaries to drink wine, crack melon-seeds, and compose poetry with him; or he may shoot off a few arrows at a target in his garden; or (and this is the commonest) he may invite the rich merchants to a "feed" in his *yamén*, or accept invitations from them. But this is rather dangerous work; for there is a sort of unwritten law against mandarins leaving their own *yaméns*, except on official business bent. On the other hand, merchants of high standing steer clear of the local mandarin unless (as happened when I was at Kewkiang) he happens to be a compatriot of theirs. On his grandmother's, mother's, and wife's birthdays, the mandarin receives congratulations and presents; of course on his own, too. On these festive occasions he may give a play. In China, theatrical entertainments are commonly hired privately, though as often as not the "man in the street" is admitted gratis. But even here caution is required; for many days in the year are *nefasti*, on account of emperors having died on those anniversaries; and it goes very hard with a mandarin if he is caught "having music" on a *dies non*.

Cornhill Magazine.



ETIQUETTE OF THE ENGLISH BAR.

A BARRISTER'S GRUMBLE.

THE etiquette of the bar, like every *lex non scripta*, is somewhat vague and difficult to define precisely. So much uncertainty prevails in matters of detail, that the highest authorities differ on points of constant occurrence. One large class of rules of etiquette is conceived in the narrowest spirit of exclusion, and has for its direct object to increase the expense of the profession to practitioners. For instance, a barrister must enter and leave the circuit town riding first-class, and if he stays at a hotel he must not dine in the public room. The reasons sometimes put forward in defense of these and similar rules, will not stand the test of a moment's investigation. It has been said that they are requisite to keep up the social position of the bar; but men of far higher station habitually travel third-class and dine in the public room of a hotel. They are sometimes defended on the ground that it is requisite to prevent the bar from coming in contact with solicitors, and other subordinate actors in the performance of an assize. This plea is either in substance the same as the former one, and rests upon some mistaken notion of artificial "respectability"; or it assumes that barristers would unfairly turn such casual encounters into opportunities for securing business. But these are lame attempts to account for the class of rules in question in some other way than the true one. The truth is, that they are designed to make the profession as expensive as possible, and thereby to exclude competition. To be a "barrister" on circuit is a sufficient reason in the provincial mind for being fleeced and overcharged. The real object in view was precisely that which trade guilds and crafts pursued in former days. They, too, had rules of etiquette and by-laws of their own, by which they made access to a

particular trade difficult, and so diminished competition. The same result is obtained by the class of rules now under consideration. Rules of this kind are against the interest of the public. The public have a clear interest that every man qualified to do the work of the profession should be allowed and enabled to compete for it; but even the profession has no longer any interest in keeping up these rules. In the present state of the bar, the number of practitioners who, in spite of the rules, are able to crowd each circuit, is so much larger than the business to be distributed would require, that it is perfectly idle to hope for any advantage by the exclusion of a few more. Behind the few men in business there is already so large a crowd of able expectants, only half of whom can ever fight their way into remunerative employment, that it is wholly immaterial whether some more names are added to the list of those doomed to disappointment. Of the same character are the rules which throw difficulties in the way of a change of session or circuit, and the rules as to special retainers. The object is to fetter competition as much as possible, and to protect those who have secured a certain status from the intrusion of dangerous rivals. "Is Mr. Spout," it will be asked, "to be allowed to range unchecked from circuit to circuit, skimming the cream of every cause list?" Why not? If the public prefer Mr. Spout of another circuit to Mr. Slowcoach of their own circuit, they may surely complain of being taxed for the preference by a rule of etiquette and obliged to pay a higher fee than Mr. Spout himself would think sufficient. Besides, if Mr. Spout obtains a brief which Mr. Slowcoach would have had, does not Mr. Hopeful, of the same circuit as Mr. Slowcoach, profit largely by his absence,

and does not Mr. Slowcoach benefit by the frequent absence of Mr. Bouncer, his most dangerous adversary on the circuit?

The most important class of rules of etiquette are unquestionably those which regulate the relation between barristers and solicitors. They are more precise and better defined than most of the rules we have been considering, and can be summed up under two heads: —

1. A barrister must not take upon himself any of the functions of a solicitor; he must not collect evidence, or even, except in peculiar cases, see the witnesses; he must not serve process nor perform any of the practical business of a cause.

2. A barrister must be instructed by a solicitor, and receive no fees but from a solicitor's hand.

The first of these rules secures to solicitors the exclusive enjoyment of their own department of practice. The second makes the intervention of a solicitor necessary in every case, even in those in which none of his peculiar functions have to be exercised. The first rule is not reciprocal. Barristers debar themselves, to an extent beyond what is required by law, from doing the work of solicitors. Solicitors constantly and habitually usurp the functions of a barrister. The functions of a barrister and of a solicitor are separated by tolerably obvious lines of demarcation. The barrister's business consists of advocacy in courts of justice, advising on points of law, conveyancing in its widest sense, and pleading. The functions essential to a solicitor are: taking instructions from the lay client, collecting evidence, serving notices and process, managing all details of practice and everything connected with the conduct of legal business, copying documents and conveyances, and instructing the advocate. Of late years, these lines of demarcation have been broken in upon, entirely to the advantage of solicitors, who have assumed to themselves a larger share of the proper functions of barristers. In the

conveyancing department it is well known how vast a proportion of country business is engrossed by solicitors at the present day. Again, in the department of advocacy, the peculiar and especial province of a barrister, solicitors are daily making fresh inroads. Formerly, solicitor-advocacy was almost confined to the small debts courts in boroughs, and to the police-courts and petty sessions. But modern legislation has opened out a vast number of other avenues, which have been occupied and engrossed by solicitor-advocates, to the exclusion of the bar.

By the existing etiquette of the legal profession, if a merchant or other person stands in need of advice on a difficult question arising, or a legal document of any kind requiring the skill of counsel, is to be prepared, or the cause of any party is to be advocated in court, members of the bar can only give their services after the client has gone through the expensive ordeal of a number of preliminary attendances, note-taking, copying, etc., on the part of a solicitor, whose bill of costs for such services will generally be at least six times the honorarium actually awarded to the barrister. The natural operation of such a system is to act as a prohibition in such cases against the employment of counsel at all, to induce the client to substitute for sound advice the impressions of the solicitor who is first called in, and, too frequently, after a long course of litigation, to submit to an unsatisfactory and costly compromise rather than take the opinion of the court. The press have, on the part of the public, frequently and loudly complained of these evils. Barristers, who suffer so severely by them, have long felt that they ought to be abated, but they nevertheless continue in all their force and, whilst the tendency of modern legislation is to extend the field of professional practice of the solicitors of this country, and to derogate from the exclusive privileges of the bar, English barristers, who have of late years increased in numbers to a formidable

rate, are, with hardly an exception, still tenacious observers of those restrictive rules of etiquette which prevent recourse being had to their services except at the discretion of a solicitor. The cause of this inverted, unnatural state of the legal profession, fraught with so many evils to the bar and to the public, is only too manifest. It arises simply and solely from the manner in which the bar has entangled its own feet in the meshes of its own etiquette. In the anxiety to make the profession select, in the indulgence of an unwholesome desire for exclusiveness, which most erroneously considers contact with the clients for whom they act as derogatory to their dignity, they have fenced themselves round with an etiquette which forbids them to see a client except through the intervention of a solicitor, and have thus abandoned to the lower branch of the profession the most dignified portion of the duty of a lawyer — the office of *jurisconsult*. That duty of giving advice to all comers, which the noble senators of Rome were proud to discharge, and in which they found a sure and blameless road to the highest honors of the republic; that duty which the ancient serjeants of England discharged, when, each seated at his allotted pillar in the nave of the old cathedral of St. Paul's, with his writing materials on his knee, he took down the complaints and answered the questions of clients, the modern bar of England is too squeamish, too delicate, too exclusive to perform. Instead of elevating the profession, this mawkish etiquette has degraded it, and whatever the barrister has gained in exclusiveness, he loses in independence. If one branch of the profession must be dependent on the other, it is the solicitor who should look to the barrister, instead of the barrister to the solicitor. The reason why this is not so is simply and solely because the solicitor sees the client first. The bar of England is placed in this unhappy position through no act of parliament, through no combination of the solicitors,

but through the suicidal folly of their own self-imposed laws of etiquette, which have actually forced upon the lower branch of the profession the patronage and power which properly belong to the counsel, learned in the law, whose duty originally was to advise their clients as well as to advocate their causes.

If the question be looked at from an historical point of view, the inference will be that the present state of professional relations is of very recent date. It is a curious inquiry to trace out the slow and gradual steps by which the solicitor system has grown from small beginnings to its present height. It is at the same time a difficult inquiry, because the materials for it are scanty and widely scattered. The old principle of Norman jurisprudence was, that plaintiff and defendant must personally appear in court. Motives of convenience led very early to a relaxation of this strict rule, and even in the *Grand Coustumier de Normandie* an *attourné*, one who attorns to prosecute or defend a suit, is distinctly recognized. In the time of Glanville it was matter of practice that the party to a suit might personally appear in court and there appoint a representative for the particular suit, called a "*responsalis ad lucrandum vel perdendum*," who had authority to bind his principal, to cast *essoins*, and to determine the suit by judgment of final concord. The king's leave was necessary for this purpose, and was given by a writ out of Chancery. The convenience to the suitor of dispensing with his personal appearance led to a series of statutory enactments extending the privilege of making attorneys. Thus the Statute of Merton enabled freemen to make suit in county courts, or courts baron, by attorney. The Statute of Westminster 1 (20 Hen. 3, c. 10) provided that tenants in writs of assize should not delay the juries by *essoins* after they had once appeared, but should make an attorney to follow the suit for them. The appointment of attorneys at this period of

history was somewhat jealously watched, and the power of admitting them was denied to clerks or officers of the courts, and reserved to the chancellor and to the judges. The consequence of waiving the strict rule of personal appearance was a rapid multiplication of suits. Inconvenience seems early to have arisen from the practice of appointing non-professional men as attorneys, and it is probable that the advocate in a suit was not unfrequently selected to represent the principal and to be his attorney. The tedium of intercourse with a lay client had probably as much influence as any other cause in leading to the rule which requires instructions to come through an attorney. Circuit messes also contributed to the growth and full development of the modern system of etiquette. Men were first censured and fined for attempting to do without attorneys, and then, as a further step, were fined and censured if they sought to cultivate them. The odious theory of hugging became possible, and was deservedly reprobated; and unscrupulous or unconscious juniors found that to shake hands with an attorney, to take tea with his wife, or to dance with his daughter, were offenses punished by circuit fines. One vestige of the old confusion of professional degrees still remains in the law officers of the Crown and of the public departments. Since the reign of Edward IV the king's attorney-general and solicitor-general, who represent him in legal proceedings, have also been apprentices and advocates, while barristers have held, and still hold, the posts of solicitors to the treasury, to the mint, and to the post-office. The Crown alone has thus retained the privilege, which once belonged to all, of choosing an advocate for its attorney. The rule which makes an attorney necessary is still a voluntary, and not a legal, rule. The case of *Doe dem. Bennet v. Hall*

(15 Q. B. 171) decided that by law a barrister may appear at *Nisi Prius* and conduct a case in the superior courts without the intervention of an attorney. The rules, therefore, which now govern the relations of barristers and solicitors are of comparatively recent origin, and cannot be defended on the plea of antiquity and tradition.

To men in practice and of established reputation the present system offers many advantages. It is an advantage to have performed by a solicitor the labor of collecting from an uninformed and talkative layman, excited by self-interest, the facts material to a legal inquiry. It is an advantage to be entirely prohibited from conducting any of the practical details of legal business, which no man in large practice as an advocate could possibly undertake himself, and would be obliged, under any system, to perform by deputy. A great disadvantage which follows from the present system, combined with the changes in legislation, is the loss of business to the bar. The business of the bar is declining by the course they have chosen to adopt. The bar have refused to do without solicitors, and the consequence is that solicitors are doing without the bar, and are absorbing all the local business of the country. What then is the effect of the system of etiquette on the interests of the public? The most obvious effect is increased expense of litigation. A litigant cannot enjoy the luxury of employing a barrister without the still more expensive luxury of having a solicitor. He is compelled to employ two skilled agents, whose elaborate professional training requires corresponding remuneration, in many cases where one would suffice. This rule of etiquette is not followed in other countries, where the bar have as high a social position as here.

— *The Law Times.*

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

FACETIÆ.

"You sign this deed of your own free will, do you, madam?" asked the notary public.

"What do you mean by that?" demanded the large, red-faced woman.

"I mean there has been no compulsion on the part of your husband, has there?"

"Him?" she ejaculated, turning to look at the meek little man sitting behind her. "I'd like to see him try to compulse me!"

Two lawyers who were good friends got on opposite sides of a case, and it was necessary for one of them to go on the witness stand. The other thought he would have some fun with his friend.

"Now, sir, are you a lawyer?"

"I was admitted to the bar in ——"

"That is not the question, sir. I ask you, Are you a lawyer?"

"I am a member of the county bar."

"That is not an answer to the question. Do you consider your advice is worth \$5?"

"I do."

"What advice did you ever give that you considered worth that sum?" asked the other triumphantly.

"When I told you that unless you stopped talking you would prove yourself a fool."

A WOMAN named O'Brien was lately brought up in a court for assaulting her husband. Her husband, being confined in bed, was unable to appear in court. The woman's face was bruised, one eye closed, the nose split, and she had a bandage over her head.

"What an awful condition the poor woman is in!" said the magistrate, pityingly.

"Och, yer worship!" exclaimed the woman, with a ring of exultation, "but just wait till yez see O'Brien!"

MAGISTRATE (kindly to prisoner): "I'll give you another trial."

MAGISTRATE (to same person next morning): "What are you here for now?"

PEARLY SAM: "I 'specs I'se here to get dat udder trial."

A PROMINENT American lawyer was sitting with Lord Esher in the county appeals in London, while a prosy but prominent queen's counsel was arguing a point. Lord Esher said to the American: "What do you think of that gentleman?" The other said, "Who is he?" "One of her majesty's counsel." "Oh," said the American, "now I understand why you use the expression I have heard so much since I came to this country, 'God save the Queen.'"

NOTES.

THE tidings reach us that Japan is adopting a new form of capital punishment. It is called the vacuum chamber. In one minute and forty seconds the cell of the condemned man will be emptied of air by a pump. Almost instant death will ensue. The chamber is to be eight feet in height, ten in width, and ten in length. In each side an air-tight window is to be inserted, of three-quarter inch plate-glass, and by such means officials may watch precisely what occurs. Meanwhile, we are informed that the prisoner will have to undergo certain mortuary preparations. He will be stripped, so as to prevent the lodgment of any air in folds of his clothing. He will also be placed on the flat of his back, with hands joined above his head, so that the chest may be contracted, thus expelling air from the lungs. . . . This is all very scientific and speedy as a means of execution, but if it aims at merciful methods

it surely is no more a success than our own electric chair. The truth is, no merciful execution seems yet to have been decided on by any nation under the sun. If the element of *miser cordia* is to be introduced, then it becomes a farce when the prisoner is made aware of his near and menacing death. Again and again, hanging has been pronounced on the best of all authority (by those who have regained consciousness after the rope had wrought complete extinction of it) a wholly painless death. I know a famous physician who had himself "hanged" when a boy, and whose appointed watcher "cut him down" in a comatose condition. He has assured me that his sensations were entirely agreeable. No; the Japanese, with all their phenomenal "advancement," have not altered matters a whit. Everything lies in the culprit's anticipation of death. Let them eliminate that, if they choose; but until they do so capital punishment must remain with them, as with us in America, as indeed with every other enlightened country, no milder than it was a century ago. — EDGAR FAWCETT, in *Collier's Weekly*.

My head is like a title deed,
Or abstract of the same;
Wherein, my N——, thou may'st read
Thine own long-cherished name.

Against thee I my suit have brought,
I am thy plaintiff lover;
And for the heart that thou hast caught,
An action lies of Trover.

Alas! upon me every day
The heaviest costs you levy;
Oh! give me back my heart, — but nay,
I feel I can't replevy.

I'll love thee with my latest breath,
Alas! I cannot you shun;
Till the hard hand of Sheriff Death
Takes me in execution.

Say, N——, dearest, if you will
Accept me as a lover,
May thine affection file a bill,
The secret to discover.

Is it my income's small amount
That leads to hesitation?
Refer the question of account
To Cupid's arbitration.

"THE government of the United States is the most cruel and rapacious creditor and the most dishonest debtor in this country. If a man has a claim against the government which needs the kindness of Congress, he had better destroy all evidence of the debt, so that future generations may not be distressed and made bankrupt in an effort to collect the claim."

These are the words of the president of the American Bar Association, as reported by the daily press. They are undoubtedly true. The fact stated is what "Case and Comment," in August, 1898, called "a serious stain on the honor of the United States government." That stain is a shameful one. In this one particular of its treatment of private claims against it our government must be deliberately declared to be one of the most dishonorable governments among men. Every lover of justice, every enlightened lover of his country, who is proud of its greatness, proud of its justice as administered by the courts, must suffer humiliation at the dishonor of his government in respect to those claims against it for which application must be made to Congress. The utter unfitness of Congress, on account of its bulk and other reasons, to dispose of these claims properly, is beyond question. The only adequate remedy is a general law to provide for something equivalent to a judicial investigation of all private claims. It is time that the moral sense of the nation was as much aroused on this subject as on that of French injustice. For the United States to stand before the world as a nation that will not do justice even to its own citizens when they have meritorious claims against it is a disgrace that should make us smart. Some member of Congress, with the requisite ability to carry the measure through, can do his country a great service in securing legislation whereby the government shall promptly and honestly dispose of all just claims against it. — *Central Law Journal*.

INTERESTING GLEANINGS.

AT the recent annual meeting of the American Society for the Promotion of Agricultural Science, Prof. W. J. Beal reported concerning the germination of seeds, after long keeping, that experiments had been tried with various seeds five, ten, fifteen, and twenty years old, from which it appeared that seeds of a large number of important plants would

germinate after fifteen years, but the number sprouting after twenty years was small. — *Popular Science Monthly*.

THE smallest coin now current in Europe, and the one having the least value, is the Greek lepton. The lepton is, according to the decimal monetary system, current in all countries belonging to the Latin union. Some idea of this valueless little disc of copper, may be gathered from the fact that the lepton is the one-hundredth part of a drachma. The Greek drachma usually passes for the same value that a franc piece does, that is, it is about equal to 20 cents of our money.

THE sun is so vast, that if it were a hollow ball, the moon could revolve in the orbit which it now follows and still be entirely enclosed within the sun's interior. For every acre on the surface of our globe, there are more than 10,000 acres on the surface of the great luminary.

AN American geography printed in 1812 contains this interesting information: "California is a wild and almost unknown land, covered throughout the year by dense fogs, as damp as they are unhealthful. On the northern shores live anthropophagi and in the interior are active volcanoes and vast plains of shifting snow, which sometimes shoot up columns to inconceivable heights." The book adds that some of these statements would seem incredible were they not so well authenticated by trustworthy travellers.

THE following statistics, recently published by the United States Government, are interesting: In 1870 American actresses numbered 692; there are now 3,883. Female architects have grown from 1 to 50; painters and sculptors from 412 to 16,000; literary and scientific writers from 109 to 3,161; pastors, from 67 to 1,522; dentists, from 34 to 417; engineers, from 67 to 201; journalists, from 35 to 472; legal profession, from 5 to 471; musicians, from 5,763 to 47,309; officers, from 527 to 6,882; doctors and surgeons, from 527 to 6,882; directors of theatres, from 100 to 943; accountants, from nothing to 43,071; copyists and secretaries, from 8,016 to 96,824, and stenographers and typists, from 7 to 50,633. These figures apply exclusively to women.

"ONE of the most famous cases on record of insects boring through books is that reported by M. Peignot, in which he states that twenty-seven folio volumes were pierced through in so straight a line that a cord might be passed through them and all the volumes raised by means of it. Different writers

give the credit of this feat to different members of this group [the *Ptinus* group] so that the most that can be said is that it was the work of some member of the *Ptinidae*."

SPRINGFIELD, Mass., Manchester, N. H., and Utica, N. Y., have each about sixty thousand inhabitants. Utica is under the Raines law, Springfield under the high-license system of Massachusetts, and Manchester under nominal prohibition. The New Hampshire city has no legal saloons, while Springfield has forty-seven, and Utica two hundred and fifty-two. But Manchester has had 1,456 arrests for drunkenness during the past year, while Springfield had 1,431. Still more remarkable is the record of only 765 arrests in Utica, or only about half as many as in Springfield, although there are more than five times as many saloons. Almost as anomalous is the showing of only 383 arrests in Dayton, Ohio, with 400 saloons and 85,000 people, while Hartford, Conn., with 77,000 people and but 219 saloons, reported 2,460. There is no possible way of reconciling such extraordinary differences, except upon the theory that the police in some cities enforce the laws much more strictly than those of others, and run in drunks when men in the same condition elsewhere would be passed by.

QUININE is derived from an Indian name—kina-kina, meaning the best bark of all. Cinchona, the technical name of the tree from which the bark is derived, is named after the Countess d'El Cinchon, wife of the viceroy of Lima, who was cured from an attack of periodical fever by the use of this drug and introduced it into Europe in 1584, but the remedy did not become popular until 1676, when it was given to Louis XIV by an English doctor named Talbot. According to others it was introduced by Jesuits and for that reason it is sometimes called Jesuits' bark. As much of the bark was brought from Peru, that also has given it the name of Peruvian bark.

A CURIOUS educational institution, a school for publishers, has been established in Paris. There is to be a three years' course, with a great variety of branches; but Sir Walter Besant will notice with regret that there is no chair of Ethics.

LITERARY NOTES.

SCRIBNER'S MAGAZINE for January, which begins the new year and volume, also marks the opening of two of its important serial features for 1900. J. M. Barrie's great novel, "Tommy and Grizel," upon which he has been at work for four years begins in

this number; and Theodore Roosevelt begins his monograph on "Oliver Cromwell," which is to be a feature of the magazine for six months. An article of great significance at the present time is Frederick Palmer's view of "White Man and Brown Man in the Philippines." There are short stories by Howard Pyle and Robert Shackleton, whose story is of political life on the East Side in New York, and Eliot Gregory describes the curious saloons (cabarets) frequented by groups of modern French poets.

THE "NEW LIPPINCOTT" for January, 1900, begins the year with a complete novel, full of fresh sensations and amusing episodes, called "The Bread Line," by Albert Bigelow Paine. A significant series of stories on Mormon life, by Mrs. J. K. Hudson, begins in this number with "The Third Wife." The short fiction consists of three extraordinary stories: "Behind the Lines," by Archibald Willingham Butt; "The Story of a Sky-Scraper," by Percie W. Hart, and a charming fairy tale for Christmas, by Evelyn Sharp, entitled "In the Prince's Shoes." Mrs. Crowninshield describes the progress of the great Paris Exposition, under the title of "The Paris Fair in Outline." "An English Music Festival," by Thomas Whitney Surette, should appeal to a wide circle of hearers. Dr. Theodore F. Wolfe, in "A Bookish Corner of New Jersey," talks about such interesting people as the Gilders, Dr. C. C. Abbott, "Clementine," the poetess, Thomas Dunn English, and others.

THERE is a new short story by Selma Lagerlöf in THE LIVING AGE for January 13. It is called "Our Lord and Saint Peter."

THE January number of the CENTURY has a Happy New Year cover, designed by Will Bradley and printed in colors. Among the contributors are the Right Hon. John Morley, Dr. S. Weir Mitchell, Rudyard Kipling, Gov. Theodore Roosevelt, Booker T. Washington, Ernest Seton Thompson, Stephen Phillips, and Capt. Joshua Slocum, and the artists represented are Mr. Thompson, Frederic Remington, Joseph Pennell, Edmund Sullivan, Varian, Potthast, and Mary Hallock Foote, to say nothing of the reproductions of paintings by Sir Thomas Lawrence, Van Dyck, and Cooper. A humorous incident of Capt. Slocum's "single-handed" circumnavigation of the globe, was President Krüger's flat denial of the navigator's statement that he was sailing "around" the world. John M. Oskison's cowboy tale, "Only the Master shall Praise," is remarkable not merely as the product of a young man

in whose veins flow a liberal admixture of Indian blood. The first instalment appears of Mrs. Foote's "A Touch of Sun." A short story by Will N. Harben is called "A Filial Impulse."

THE future of Cuba and Porto Rico, the Philippine question, financial legislation in the new Congress, Secretary Root's report, the British reverses in South Africa, and the recent progress of American municipalities, are some of the topics editorially treated in the January REVIEW OF REVIEWS. The subject of the character sketch is Secretary John Hay, who by reason of the death of Vice-President Hobart becomes the successor apparent to the Presidency.

THE opening chapters of the "Autobiography of W. J. Stillman," which begin the January ATLANTIC, form an exceptionally interesting and frank statement of his boyhood. Zitkala-Sä writes her "Impressions of an Indian Childhood;" William DeWitt Hyde discusses "Reform in Theological Education;" and John J. Chapman voices his creed of political reform in a combination of paradox and satire entitled "Between Elections." "The Future of the Chinese People" is ably treated by D. Z. Sheffield. R. Brimley Johnson contributes an interesting review of "England in 1899," from the point of view of a man of letters; and there are short stories by Jack London and Margaret L. Knapp.

WHAT SHALL WE READ?

A little volume entitled *Christian Science*¹ is made up of a series of papers, most of which have already appeared in the *North American Review* and the *Medical Record*. Four of them deal with the exposition of Mrs. Eddy's teachings, her own account of herself, and the status of her cult before the law. Another treats of the educational effect and policy of medical legislation, and the last shows how, by enforcement of medical laws not consonant with public opinion, the apothecary in England became a general practitioner of medicine. The author finds the best proof that the articles originally published in the *North American Review* are fair expositions of Mrs. Eddy's life and teachings in the fact that their accuracy has not been denied. The subject is one which is at present exciting almost universal interest; and while Mr. Purrington hits some telling blows, he makes

¹ CHRISTIAN SCIENCE. An Exposition of Mrs. Eddy's Wonderful Discovery, including its Legal Aspects. A Plea for Children and other Helpless Sick. By William A. Purrington. E. B. Treat & Co., New York, 1900. Cloth, \$1.00.

no willful misstatements, but evinces throughout an honest desire to be perfectly fair. The book is one which will give much food for reflection to those who have any tendency towards the beliefs of Christian Science, and will be read with interest by all, except, perhaps, the followers of Mrs. Eddy.

Brook Farm, its Members, Scholars, and Visitors, by Lindsay Swift, is the title of the coming volume in the "National Studies in American Letters," which are edited by Professor George E. Woodberry, of Columbia University, and published by The Macmillan Company. This book is a history of the experiment in social reform known as Brook Farm, with a biographical and critical account of the distinguished persons associated with it,—Dana, Curtis, Ripley, Alcott, Channing, Dwight, Margaret Fuller, Hawthorne, Hecker, Bronson, and also of many of the lesser known members and visitors. The subject is one of lasting interest, since it not only involves the lives and works of such eminent American names, but throws so clear and illuminating a light on the conditions of that intellectual and social ferment in New England which attended its literary period.

Mr. Stephen Bonsal, lately war correspondent to the *New York Herald*, has written a book which The Macmillan Company have just published under the title of *The Golden Horse-shoe*. It is the story of recent American expansion told with unconscious force and lucidity throughout a series of letters exchanged by two young officers of the army from their respective posts in the Philippines and in Puerto Rico. In editing this correspondence of two inconspicuous actors in recent events, Mr. Bonsal has rendered a public service. The frankness which was possible in a private letter adds to the historical value the additional charm of personal narration, untrammelled by reservations.

A delightful series of essays on leading English *litterateurs* will be found in Frederic Harrison's new work, *Tennyson, Ruskin, Mill, and other Literary Estimates*.¹ Some of these studies have already appeared in print, but most of them are now presented to the public for the first time. In addition to the names appearing in the title, there are papers on Matthew Arnold, John Addington Symonds, Lamb, Keats, Gibbon, Froude, and Freeman.

A new history of France has just been published by The Macmillan Company. The author, Mr. Thomas E. Watson, gives an interesting and clear narrative of the development of the French nation,

¹ TENNYSON, RUSKIN, MILL, AND OTHER LITERARY ESTIMATES. By Frederic Harrison. The Macmillan Co., New York, 1900. Cloth, \$2.00.

and his *Story of France*¹ will deservedly take a high place in historical literature. To note the varying forms of government; to trace the ancient origin of laws and customs; to mark the encroachments of absolutism upon popular rights; to describe the long-continued struggle of the many to throw off the yoke of the few; to emphasize the corrupting influence of the union between Church and State; to illustrate once more the blighting effects of superstition, ignorance, blind obedience, unjust laws, confiscation under the disguise of unequal taxes; and the systematic plunder, year by year, of the weaker classes by the stronger,—have been the motives which led the author to undertake the enormous labor involved in this work. We commend the book to our readers as one of the most satisfactory histories published for a long time.

Nothing so healthfully stimulates the study of history as a visit to the scenes made memorable by the lives of great men or the march of great events. Boston is particularly favored in having at its very doors many places of the greatest historical interest, and Mr. Drake in his *Historic Mansions and Highways around Boston*² takes the reader over ground which was the scene of stirring events in our country's history, and so graphically describes the places and the events connected with them that one feels at once an inspiration and desire to visit and stand on the very spot where our national life began. The book abounds in legend and anecdote, and is fully and beautifully illustrated.

The struggle between the French and Spanish for the possession of Florida affords a romantic set of incidents for the pen of a story-writer, and in *The Sword of Justice*,³ just issued by Messrs. Little, Brown & Co., the author has improved the opportunities offered to the utmost. The historical portion of the story deals with the events treated of in Parkman's "Pioneers of France in the New World," from the destruction of the Huguenots by Menendez at Fort Caroline, Florida, to their avenging by Dominique de Gourges. The tale of Pierre Debré, who escaped from the massacre of Fort Caroline and who, having been adopted as the son of the Indian chief, Satouriona, lived as an Indian, and of his love for Eugénie Brissot, another Huguenot, taken captive by the

¹ THE STORY OF FRANCE, from the Earliest Times to the Consulate of Napoleon Bonaparte. By Thomas E. Watson. The Macmillan Co., New York, 1899. 2 vols., cloth, \$5.00.

² HISTORIC MANSIONS AND HIGHWAYS AROUND BOSTON. By Samuel Adams Drake. With illustrations. Little, Brown & Co., Boston, 1899. Cloth.

³ THE SWORD OF JUSTICE. By Sheppard Stevens. Little, Brown & Co., Boston, 1899. Cloth, \$1.25.

Spaniards, is told by the author with great power and effectiveness. Altogether this story is the best bit of historical fiction we have read for a long time, and it deserves a hearty welcome at the hands of the reading public.

NEW BOOKS FOR LAWYERS.

THE YEARLY SUPREME COURT PRACTICE, 1900, being the Judicature Acts and Rules 1873 to 1899, and other statutes, and orders relating to the practice of the Supreme Court, with the appellate practice of the House of Lords, with practical notes. By M. MUIR MACKENZIE, B.A.; S. G. LUSHINGTON, M.A., B.C.L.; and JOHN CHARLES FOX. Butterworth & Co., London, England, 1900. Cloth. Twenty shillings, *net*.

In this volume the authors present in a concise form the whole of the Practice of the Supreme Court, except some such special branches as Probate, Divorce, Lunacy, Bankruptcy, etc. The notes are very full and exhaustive and the work has in every respect been brought up to date. To English lawyers this work must be of great value, and as a book of reference it should find a place in all our American Law Libraries.

NOTES ON THE UNITED STATES REPORTS. Books III and IV. By WALTER MALINS ROSE of the San Francisco bar. Bancroft & Whitney Co., San Francisco, 1899. Law Sheep. \$6.50.

The third volume of this excellent series (which we noticed at length in our November, 1899, number.) covers the cases in 3-13 Peters, and the fourth, the cases in 14-16 Peters and 1-10 Howard. The notes and citations are numerous and exhaustive, and the volumes as a whole confirm us in the opinion we expressed that the publication is destined to attain the greatest success of any legal work of recent years.

THE LAW OF JURISDICTION, including impeachment of judgments, liability for judicial acts, and special remedies, as follows: Divorce; Contempt, Habeas Corpus; Certiorari; Prohibition; Quo Warranto; Mandamus. By W. F. BAILEY, late circuit judge of Wisconsin. T. H. Flood & Co., Chicago, 1899. Two vols. Law sheep. \$12.00.

We cannot describe the scope of this work better than by quoting from the author's preface: "It is essentially a work on jurisdiction. I have taken that subject as the trunk of the tree, so to speak, and

those remedies which are framed with special reference to jurisdiction as branches, and treated them all in connection as one continuous whole. How and in what manner jurisdictional defects may be met is part of the general subject. In fact, in no other manner can the subject of jurisdiction be treated without much of unnecessary repetition. In this way much that is valuable is preserved, by reason of uninterrupted connection. It enables the whole subject to be placed in comparatively limited space, thus avoiding the expense of numerous works, each treating separately the distinctive branches of jurisdiction, and each necessarily containing a repetition of the general doctrine and the special rules and exceptions which apply to it."

It will be seen from the foregoing that these two volumes cover a wide field, but that field is thoroughly and exhaustively covered. A careful examination of the treatise discloses most careful and conscientious work on the author's part. We welcome these volumes as a valuable addition to our legal text-books, and bespeak a cordial reception for them at the hands of the profession.

AMERICAN STATE REPORTS, VOL. 69, containing the cases of general value and authority decided in the courts of last resort of the several States and Territories. Selected, reported and annotated by A. C. FREEMAN. Bancroft-Whitney Co., San Francisco, 1899. Law sheep. \$4.00.

We can add nothing to the many words of praise which we have heretofore expressed for this series of reports. There is no falling off in the excellent judgment displayed by Mr. Freeman in his selection of cases, and his notes and annotations are as exhaustive and valuable as ever.

THE LAW OF ANIMALS. A treatise on property in animals, wild and domestic, and the rights and responsibilities arising therefrom. By JOHN H. INGHAM, of the Philadelphia Bar. T. & J. W. Johnson, Philadelphia, 1900. Law sheep. \$6.00.

It is somewhat strange that the subject exploited in this volume has hitherto been almost wholly disregarded by our legal writers, but up to this time no effort has been made to work the scattered elements of the law of animals into an organic structure. Mr. Ingham has prepared not only a very valuable, but also an exceedingly interesting treatise upon the subject. Every phase of the law is fully and exhaustively covered, and the work is one which all lawyers will find of great assistance in their practice.



BARON MARTIN,

The Green Bag.

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BARON MARTIN.

THE Right Honorable Sir Samuel Martin, son of Samuel Martin, of Calmore, Londonderry, was born in 1801. He was educated at Trinity College, Dublin, and like Cairns and Willes came to seek his fortune at the English bar.

He was not a brilliant or versatile man, nor had he any of the wit or eloquence which so often distinguishes the sons of Erin, but he had, what is much better in a lawyer, a clear, strong, wise intellect, and a sound knowledge of the law. He was a large man, careless in his dress, speaking plain common sense in terse, simple language, with a brogue which he never lost in spite of his long residence in England. He entered at Gray's Inn in 1821, and afterwards at the Middle Temple, and he was called to the bar by the latter society in 1830. He learned the elements of law in the chambers of Frederick Pollock, afterwards Chief Baron.

In those days barristers had no evenings at home at all. Consultations were held in the evenings, so that dining out or entertaining guests was out of the question, but often, as the Chief Baron's son says in his remembrances, "My father would bring home to dinner one or two men from his pupil room," but even this gayety was of short duration, for "at fifteen or twenty minutes to seven the inexorable hackney coach would come to the door, and carry off host and guests together to the Temple, where consultations and answering of cases occupied the rest of the evening."

As a result of these visits, hasty as they were, an attachment sprang up between the young Irish barrister and a daughter of the

Chief Baron, and they were married in 1843.

Martin's first brief was in a turf case, raising the question whether a horse called Bloomsbury, which had won the St. Leger, was disqualified or not for being misdescribed. This was peculiarly appropriate, for Martin was a great lover of horses and much interested in all that concerned them. He never made a bet, but his knowledge of the "Racing Calendar" was something extraordinary. In the old days of the Northern Circuit, when the journey had to be made by coach, he knew every team on the road; and when the way lay by the racing paddocks of Yorkshire, he would point out and give the name and history of every horse in the paddocks that could be seen from where he sat on the coach top.

After thirteen years at the junior bar he became a Q. C. in 1843, and stepped at once into a leading practice at Guildhall. He probably owed something of his success to his father-in-law, the Chief Baron, with whom he was a great favorite. Pollock was supposed to show him great partiality, but nothing probably was further from the intention of the Chief Baron. However that may be, it was the cause of an unpleasant scene in court, when, on one occasion, Martin was for the Crown against Sir F. Thesiger (afterwards Lord Chelmsford) for the defendant in an action tried before Pollock. In the course of the case, Thesiger rose and declared with warmth that it was impossible for counsel to do his duty in that court when he had Mr. Martin as his opponent.

The library in his chambers overlooking the fountain in the Middle Temple was very

characteristic, and consisted of law books, the Bible, and the "Racing Calendar." Yet he was not entirely without literary tastes, for he knew English history and Scott's novels thoroughly, and was the author of a short but sound treatise on Lord Tenterden's Act. He was not in any way ashamed of his lack of literary culture, as the following instances will attest. On one occasion, in a real property case, a very learned counsel referred to the laws of Howel Dha. "I don't believe there was such a mon," said the Baron.

Serjeant Robinson relates that on one circuit Baron Martin took Frank Talfourd round with him as his marshal. One evening after dinner, rousing himself from a short nap, the Baron found Frank reading Shakespeare. "I find, Frank," he said, "you are always reading plays, and especially Shakespeare, I never found time to read him myself, but I suppose he is a big fellow."

"Yes, Baron," was the reply, "he is generally acknowledged to be the greatest poet the world ever produced."

"Well," said the judge, "I think I should like to read one of his works, just to see what it is like. Which do you recommend?"

"They are all admirable productions," replied the marshal, "but I have just been again reading 'Measure for Measure,' and I think that will, perhaps, please you as well as any."

"All right," said the Baron; "lend it to me, and I will read it before I go to sleep."

The next morning, he was, of course, asked how he liked the play.

"Well," was the Baron's reply, "I can't say I think much of it; it contains atrociously bad law, and I am of opinion that your friend Shakespeare is a very much overrated man."

Robinson also tells the story of how once, when he went as judge on the Western Circuit, he was invited to dine with the Dean of Winchester, whom he had never met

before. After the judge had gone the Dean remarked to the guests left behind, "What an agreeable man Baron Martin is; but, for a judge, how ignorant! Why, he had never heard of William of Wykeham!"

Tradition, however, records that at that very moment the judge was having his revenge. On entering his carriage, he said to his marshal, "I like the Dean, but he seems very deficient in a knowledge of what is going on in the world; he absolutely did not know what horse had won the last Derby."

Judges have been known to resort to various expedients for going to the Derby, encouraging compromises, or even making up dummy cause lists. Baron Martin had the courage of his tastes. It was on the assizes at Liverpool—so the story goes—and the eve of the Grand National. "Gentlemen," he said, "to-morrow an event of national importance is to take place, cannot we get on a little faster?" A friend met him once in the Bois de Boulogne at Paris on a Sunday when the races were going on, and said, "It would not do for you, Baron, to be seen in England amid such scenes on the Sabbath day."

"Well," said the Baron, piteously, "I cannot help it. What would you have me do when they will not race here any other day than Sunday?"

It is said that if an illustration came from him in banco it was pretty sure to begin, "Suppose I bought a horse."

After his retirement from the bench he was elected an honorary member of the Jockey Club—an honor greatly prized by him. The only known attempt made to bribe him, when a judge, came from a prisoner who must have had an idea of his sporting tastes. He was convicted, and on being called upon before sentence, he said, "I hope your lordship will not be hard upon me; and perhaps your lordship would accept a beautiful game-cock I have at home." Martin put up his hand to hide

a smile, and then passed a sentence, not at all severe, adding, "Mind, you must not send me that game-cock."

Shortly after taking silk, Martin was elected, at the general election, in August, 1847, on Liberal principles, one of the members for Pontefract, which he represented till 1850. His unsuccessful opponent was the late Lord Houghton, then Monckton Milnes. It was on this occasion that a voter, more or less under the influence of liquor, presented himself at the poll, and, on being asked for whom he voted, answered, "I vote for Mr. Gully's friend." The clerk not unnaturally refused to take the vote, but Mr. Milnes, interposed with, "We all know what that means. Take the vote for Martin."

In 1850, Baron Rolfe was made a vice-chancellor, and Martin was appointed to fill his place. He, with Bramwell and Willes, have been classed as the three strongest judges of the century, and this is true in the sense that they were not led by counsel, but had decided opinions of their own, with sound legal reasons to back them. Shortly after Martin's appointment, Campbell enters in his diary: "I have had a very agreeable circuit, the Oxford, my colleague being Baron Martin, an excellent lawyer and an exceedingly good-natured fellow. We got through the whole of our business extremely well at every place, leaving no remnants, and asking for no assistance."

On the bench, as well as at the bar, Sir Samuel sought to reduce matters to a small compass. After a great deal of contradictory evidence and long speeches made in a case which he was trying, he summed up as follows: "Gentlemen of the jury, you have heard the evidence and the speeches of the learned counsel; if you believe the old woman in red, you will find the prisoner guilty; if you do not believe her, you will find him not guilty." The length of his charge, however, was no indication of the anxiety with which he considered his cases.

After pronouncing a severe sentence in court, he would sometimes modify it in favor of the prisoner before signing the charge sheet. Trying capital cases was extremely repugnant to him, and when trying such a case was unavoidable it weighed on his mind for weeks beforehand. His was a kindly nature and it sometimes overflowed in charity to those whose woes came before him in court. A writer in the "Times" related the following stories: —

"A wandering boy fiddler had been robbed by gypsies and left tied to a tree. The scoundrels who had pillaged him were discovered, and sentenced by Baron Martin. The learned judge made inquiries about the prosecutor, found he was alone in the world, used influence to get him into a school, and regularly sent him a hamper while he was there. The object of this wisely directed assistance now occupies a respectable position in life.

"A miserable creature who had committed some trifling offense was brought before Baron Martin on circuit, and sentenced to three days' imprisonment, which meant immediate release. The Baron was struck by his wretched demeanor, sent round to know whether he had any money, and, on hearing that he was penniless, made the culprit whom he had just condemned a present of £10."

He was not, however, indiscriminate in his mercy. Once at Liverpool, he had before him a man who had committed some peculiarly atrocious crime. Baron Martin, in charging the jury, had worked himself up to such a fervor of honest indignation that when they immediately returned a verdict of "Guilty" he felt he could hardly trust himself to give judgment calmly; so he turned to the prisoner and said, "Would you like to have sentence to-night or to-morrow morning?" The convict, who had felt every word of the judge's summing up like a blow of the lash, cowered in the box, and, hoping that the night would mitigate the judge's wrath, asked for a respite until

the next morning. Next morning the judge, having slept on the case, was cool and collected. "Put that man up," he said, and the warder caused the prisoner to appear. Baron Martin then sentenced him to the heaviest punishment the law could inflict. Another version of this story says that on the morning in question the court was crowded with people, expectant of some such elaborate and eloquent speech to the prisoner as some judges would not have lost the chance of making. All that Baron Martin said was: "Prisoner at the bar, you're a very bad man. You'll have ten years of it."

His breadth of view sometimes verged on grotesqueness when carried into the small details of practice. He not infrequently sat at Judges' Chambers, and on one occasion was asked to give an order for interrogatories, which in those days was always necessary in the common law courts. "How many are there?" asked the baron, without looking at them. "Twenty," was the reply. "I shan't make an order for a man to answer twenty interrogatories," rejoined the judge. "You may ask him half a dozen, and take which you please."

Sometimes he preferred his native knowledge of the law even to the express terms of an Act of Parliament. On his last circuit at Lewes, a partner was committed for trial for stealing partnership money. In charging the grand jury, Martin told them to throw out the bill. "Whoever heard," he asked, "of a man stealing his own money? It cannot be, gentlemen." The clerk of arraigns stood on his seat to hand up to the judge the Act of Parliament making it a felony to steal partnership money, but Martin would pay no attention. "Never mind the Act of Parliament, Mr. Avory; take it away. The man who drew that act knew nothing about the law of England."

Baron Martin, sound as his decisions usually were, did not leave his mark on the Reports, because his mind was not of the

analytical order, and although he could hit the mark himself, he could not tell others how he did it. Sometimes his insight into equity led him right while others went astray. In *Smyth v. North*, Barons Martin and Pigott, notwithstanding the dissent of Baron Bramwell, held the view, which is now considered orthodox, that the word "surrender" in regard to the disclaimer of leases under the Bankruptcy Act has a sense of its own, and not the legal sense.

If these stories are not enough, there is one which suggests the key to Sir Samuel Martin's whole character. He asked a young lawyer how he was progressing in the law, and was told that its complications puzzled him. "Nonsense!" said Baron Martin; "bring your common sense to bear on it, mon. That's what I always do; and I generally find I'm right."

His ready wit sometimes extricated him in an unexpected way from the intricacies of the net of subtlety woven around questions at the bar. Thus he was sitting in banco, with Baron Bramwell by his side, in the little room up many stairs, known as the second Vice-Chancellor's Court, at Westminster, now happily among the courts abandoned, while a long-winded counsel was "distinguishing" the case before them from a decision of the House of Lords. After painfully enduring the operation for some time, the Baron said, "You are very much mistaken, if you think that my brother Bramwell and I, sitting in this cock-loft, are going to overrule the House of Lords."

One of the most sensational cases tried before him was the Hatton Garden murder, in which an Italian had been stabbed in a low public-house brawl. The curious thing was the question of identity raised. Baron Martin convicted one man, Mr. Justice Byles another, so that two prisoners were lying under sentence of death for the same crime, one only of whom was guilty. The slow poisoning case referred to in 26 "*Law Times*,"

p. 158, was another case of his which attracted much attention at the time.

Among his most interesting cases was that of *Miller v. Salomons* (7 Ex. Rep. 475), raising the question, on which Macaulay so eloquently and convincingly argued, as to the civil disabilities of the Jews. It was an action against a Jew member of Parliament for Greenwich, to recover penalties for having voted without properly taking the oath of abjuration, i. e., omitting the words, "On the faith of a true Christian." The issue really narrowed itself to this, whether the words in question, "on the faith of a true Christian," were surplusage, in the sense that it was sufficient that the terms of the oath without them would bind the conscience of the abjurer, or whether they were designed to obtain a profession of Christian faith. The majority of the court were of opinion that they were so designed. Baron Martin dissented, and delivered an elaborate judgment, and it must be confessed that common sense was on his side, but the words of the statute were too strong to be got over. The whole subject was threshed out again, but under somewhat different conditions, by the late Charles Bradlaugh.

Embrey v. Owen (6 Ex. Rep. 353), is an important case on water rights. Flowing water, it decides, is *publici juris* in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. The same principles apply to air and light.

Crossed checks are a great mystery to the uninitiated. *Bellamy v. Majoribanks* (7 Ex. Rep. 389) is a very instructive case on their origin and meaning. According to it, the crossing of a check payable to bearer with the name of the banker, whether made by the drawer or bearer, does not restrict the

negotiability of the check to such banker or to a banker only, but is a mere memorandum that the holder is to present it for payment through some banker. The practice of crossing checks originated, it seems, at the clearing house; the clerks of the different bankers who did business there having been accustomed to write across the checks the names of their employers, so as to enable the clearing-house clerks to make up the accounts.

We are so frequently told that an Englishman's house is his castle, that it is rather startling to find that, though it is illegal to break open outer doors or commit violence, a landlord is entitled to enter the premises for the purpose of distraining by turning the key, by drawing a bolt, by raising a latch, or by any other means usually adopted by the tenant (*Ryan v. Shilcock*, 7 Ex. Rep. 72).

A very able judgment of his is to be found in *Crouch v. Great Northern Railway Company* (11 Ex. Rep. 742), which decided that a railway company cannot legally charge a greater sum for the carriage of a package containing several parcels belonging to different persons than for a package containing several parcels all belonging to one person. The company's contention was, that a misdelivery in the former case would expose them to several actions of trover. This was the legal objection; the real one, of course, was loss of business. Baron Martin points out very clearly that the proper action against a carrier for misdelivery is an action on the custom of the realm or bailment; in other words, on the contract, and that upon a single bailment there could not be two actions.

After three and twenty years of judicial life, Baron Martin felt that his increasing deafness counselled his retirement, and early in 1873 he retired, amid the universal regret of bar and bench—regrets for a most able, as well as most kindly and genial judge. In his combination of tenderness and

robustness, and in other ways, he was not unlike Dr. Johnson, but without his learning. His strongly-marked individuality, with so little of the conventional judge about him, made him a very noticeable figure on the bench, and he will be remembered when more able judges have been forgotten.

For the remaining ten years of his life he lived six months of every year in Ireland on his estate in his native county of Lon-

donderry, and the other six months in his chambers in Piccadilly (he rejoined the bench of the Middle Temple in 1878), reading a great deal, taking a keen interest in the bar, and in the rising young men, and dining daily at Brooke's. He died in 1883, at the age of eighty-two. His epitaph, he would jestingly say, he wished to be —

"Here lies a judge who never left a remnant."

MODERN INTERNATIONAL LAW PROBLEMS.

I.

EX-TERRITORIAL LEGISLATION AND JURISDICTION.

NO problem of modern international law is more interesting or more likely, in some countries at any rate, to give rise to practical difficulties in the near future than that of the right or claim of States to legislate, or exercise jurisdiction, beyond their own territories, or with ex-territorial effect. In England and the United States there has been a practically unanimous acceptance of the view that international law prohibits the legislature from passing laws for the punishment of foreigners for offenses committed on foreign soil, or from erecting courts on foreign territory, and the English parliament has been extremely cautious in legislating with regard to offenses committed even by British subjects on such territory.¹ An examination of the cases in which English law has an ex-territorial range may be of some value.

¹ It is pointed out by Sir Courtenay Ilbert in his admirable work on the "Government of India," p. 407, note 1, that continental states have asserted the right to punish foreigners for offenses committed in foreign territories, especially for acts which attack the social existence of the state in question, and endanger its security, and are not provided against by the penal law of the country in whose territories they take place.

1. *Offenses at sea.* The jurisdiction of the Court of the Admiral formerly extended, and that of the ordinary courts of criminal jurisdiction now extends, to offenses committed on board a British ship, whether on the open seas or on foreign territorial waters below bridges, and whether the offender is or is not a member of the crew, and although there may be concurrent jurisdiction in a foreign court. See *R. v. Anderson*, 18 L. R., 1 C.C.R. 161; *R. v. Carr*, 1882, 10 Q. B. D. 76. This provision does not apply to alien enemies or aliens on board a British ship against their will (11 Steph. Hist. Crim. Law, 4-8). By the Territorial Waters Jurisdiction Act, 1878 (41 and 42 Vict. c. 73) an offense committed by *any person* within the territorial waters of Her Majesty's dominions is an offense within the admiral's jurisdiction (and therefore, now within that of the ordinary criminal courts) although committed on board, or by means of, a foreign ship (giving effect to opinion of minority of judges in *R. v. Keyn*, 1876, 2 Ex. D. 76). But jurisdiction is not exercised or claimed in respect of offenses committed by a British subject on board a foreign ship

when on the high seas, where he is a member of the crew of that ship, in which case he may be assumed to have accepted foreign law for the time being. Sections 686 and 687 of the Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60), must also be referred to in this connection. Where any person (1) being a British subject is charged with having committed any offense on board any British ship on the high seas, or in any foreign port or harbor, or on board any foreign ship *to which he does not belong*, or (2) not being a British subject, is charged with having committed any offense on board a British ship on the high seas,—and that person is found within the jurisdiction of any court in her majesty's dominions, which would have had cognizance of the offense if committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offense as if it had been so committed (s. 686), the words italicised in s. 687, the substance of which will be stated immediately, should also be carefully observed, as they amount to legislation. Foreigners who have ceased to have any connection with a British ship, all offenses against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions, by *any* master, seaman or apprentice, who, at the time when the offense is committed, *is or within three months previously has been* employed in any British ship, are to be punishable, as if committed within the jurisdiction of the admiralty of England (s. 687). It is doubtful whether, if the question were tried, the words in italics would receive a literal interpretation.¹

It may be added as a concluding note on this subject, that piracy committed on the open seas, whether by a British subject or

not, comes within the criminal jurisdiction derived by the English courts from the old jurisdiction of the admiral. Reference may be made as to the present heading to the excellent notes on the American law of the subject by the late Mr. Irving Browne in 5 "Ruling Cases" at p. 975, and 8 *ib.* at p. 15.

2. Provision is made by 35 Hen. VIII, c. 2, for the trial in England of *Treason*, committed on land out of the realm. The obvious justification of this rule is that acts treasonable by English law may not be punishable by the law of the country in which they are committed. Probably the idea that, as treason is a direct offense against the sovereignty of the crown, the right to punish it ought to be retained by the crown, may, to some extent, have inspired it. It should be noted, however, that this rule is based on the same considerations that induce continental countries to exercise, as we have already observed that they do, their power of punishing offenses committed abroad.

3. *Murder or manslaughter* by a British subject on land outside the United Kingdom, is triable wherever the accused is apprehended or in custody in England (24 and 25 Vict., c. 100, s. 9). *Conspiracy to murder* was made felony in 1861, and in consequence of the case of *Reg. v. Bernard*, 1858, 1 F. & F., 240, was extended so as to include conspiracies in England or Ireland to commit murder, within or without the Queen's dominions (24 and 25 Vict., c. 100, s. 4). *Accessories* can be tried (1) in the case of a felony wholly committed in England by any court which can try the principal offender or can try felonies in the place where the act constituting the accessory was done; (2) in the case of a felony committed partly on sea and partly on land, within or without the Queen's dominions, by the court which can try the principal offender, or can try felonies committed in the country or place in which the accessory is apprehended

¹ Sir Courtenay Ilbert ("Government of India," p. 413, note 1) mentions another possible case of jurisdiction over foreigners for offenses committed on foreign territory, viz.: breach of duty to the crown committed abroad by a foreign servant of the crown.

or is in custody (24 and 25 Vict., c. 94, s. 7).

4. Any offense under the *Commissioners for Oaths*, Act 1889 (52 Vict., c. 9), which deals with oaths for purposes of judicial proceedings in England, although committed out of the United Kingdom, may be tried or punished in any county or place in the United Kingdom in which the accused was apprehended or is in custody (*ib.*, s. 9).

5. The English courts have power to try any British subject who anywhere in the world commits *bigamy*, no matter where his first marriage took place (24 and 25 Vict., c. 100, s. 57). Colonial legislatures, however, have no jurisdiction over bigamy under colonial acts, except where the first marriage took place within the colony (see *McLeod v. A. G. of New South Wales* [1891], App. Cas. 455).

6. Offenders against the *Slave Trade Acts* may, if British subjects, be tried by the English courts wherever the offenses were committed (see 5 Geo. IV, c. 114, ss. 9 and 10).

7. The act of enlisting or inducing any person to enlist in the military or naval service of a foreign state at war with a friendly state, contrary to the *Foreign Enlistment Act*, 1870, if committed by a British subject anywhere, is punishable by the English courts (33 and 34 Vict., c. 90, s. 4). See further as to this statute, *Reg. v. Jameson* [1896] 2 Q. B. 425; *Dyke v. Elliott*, 1871, L. R. 3, Ad. & Ec. 381; *The International*, *ib.* 321; *Reg. v. Sandoval*, 1886, 56 L. T. 526, and see the "Salvador case" (L. R., 3 P., c. 218), under the *Foreign Enlistment Act*, 1819 (59 Geo. III, c. 69).

There remains to be noted *foreign jurisdiction* in the strict sense of the term—or the jurisdiction which certain foreign states have consented by treaty, etc., to allow the British government to exercise within territorial limits in which these foreign states would otherwise have absolute power. This jurisdiction grew out of the mediæval Capitu-

lations, and when on the dissolution of the Levant Company, in 1825, doubts were expressed by the law officers as to whether the consular arrangements then in force within the Ottoman Empire were legal, the question of general legislation on the subject was taken up and a series of *Foreign Jurisdiction Acts* commencing in 1843 and ending in the present Act of 1890—were passed. The *Foreign Jurisdiction Act*, 1890, declares that "whereas by treaty, capitulation, grant, usage, sufferance and other lawful means" the Queen "has jurisdiction within divers foreign countries," such jurisdiction may be exercised in the same manner as if it had been acquired *by the cession or conquest of "territory."* Leave is then given to the Queen by order in council to bring into operation a great variety of Acts of Parliament, chiefly relating to evidence, fugitives, offenders and admiralty offenses. The jurisdiction is ordinarily limited to cases in which a British subject is defendant and does not authorize the courts to entertain counterclaims by a British defendant against a foreign plaintiff. *Hart v. Gumpach*, 1872, L. R. 4, P. C. 439. *Imperial Japanese Govt. v. P. & O. S. N. Co.* [1895] App. Cas. 644. The orders now in force will be found in "Enclo. Laws of England," Vol. V, at p. 430; and in the *Statutory Rules and Orders Revised for 1898 and 1899*. We may give a brief analysis of a specimen of them—the *Africa Order in Council*, 1889. The order itself will be found in *Stat. R. & O. Rev.*, Vol. III, at p. 259 (and see "Law Times," August 5, 1899). The general limits of the order are the continent of Africa, with maritime and interior territorial waters and adjacent islands, excluding Madagascar, since August, 1896, when it became a French colony; but the powers conferred are only to be exercised within local jurisdictions constituted for the purposes of the order (s. 4) by the Secretary of State's instructions (s. 5). The following places are excluded from

every local jurisdiction: (1) Places within the ordinary territorial jurisdiction of the courts of any African possession of Her Majesty or of any other non-African power; (2) Morocco, Tunis, Liberia, Zanzibar, South African Republic, Orange Free State; (3) places as to which any other independent order in council is in force; and (4) places subject to the jurisdiction of the Egyptian courts (s. 6). The powers given by the order apply to (1) British subjects, that is (s. 3) persons enjoying her majesty's protection, including subjects of native princes and states in India; (2) property and personal and proprietary rights within the jurisdiction; (3) foreigners submitting, and whose government has made them amenable to the jurisdiction (s. 10). Civil and criminal jurisdiction is to be exercised *ceteris paribus* in accordance with English law (s. 13); and the Secretary of State may by "instructions" apply to a local jurisdiction the laws or ordinances of any "African possession" of her majesty, including Mauritius (ss. 3, 15). Treaties with respect to places within "local jurisdictions" are to have effect (s. 16), and crimes, breaches of contract, etc., against natives of Africa are cognizable as if affecting British subjects (s. 17). The following local jurisdictions have been constituted with a court of appeal, intermediary, in each case, between the consulate courts and the privy council: Oil River Protectorate, *Court of Appeal*, Supreme Court of Lagos; Congo, *Court of Appeal*, Supreme Court of Gold

Coast; British sphere in East Africa, excluding Zanzibar, for which there is a separate order in council, *Court of Appeal*, High Court of Bombay; formerly Madagascar, *Court of Appeal*, Supreme Court of Mauritius (see Haggard *v.* Pelicier Frères), 1892, App. Cas. 61 — an interesting appeal to the Privy Council from Madagascar through Mauritius, in which it was held that the judges of courts regulated under the Foreign Jurisdiction Acts are entitled to the same protection from suits as courts of record: British sphere north of the Zambesi, *Court of Appeal*, Supreme Court of Cape of Good Hope. The unit of jurisdiction in each of these territories is a consular court, which is a court of record and also of law and equity, with probate, bankruptcy, admiralty and criminal jurisdiction as well. It is presided over by the consul-general, or the consul, or vice-consul or judicial officer or commissioner. Sentence of death by the consular court must be confirmed by the secretary of state. The order contains minute provisions — based on English law — as to procedure. A careful study of this and other orders in council under the Foreign Jurisdiction Acts throws an interesting sidelight on the application of the law of civilized countries in uncivilized or semicivilized communities. The English Orders reach a high level of judicial expression and of range, and are worthy of the attention of countries in which foreign jurisdiction is beginning to develop.

LEX.



A BOGUS BABY CASE.

By J. FERGUSON WALKER.

IT is difficult to say what constitutes the lacme of audacity in man, but the question admits of a plain answer in the case of woman. To procure a new-born infant and deliberately attempt to palm it off as her own, is at once the most daring and most difficult feat that a woman can set herself to accomplish. Such an attempt has perhaps never been made with greater coolness, foresight and resource, than were shown by Mrs. Salisbury in the circumstances disclosed in the extraordinary case of *Salisbury v. Rawson* tried in London several years ago before that famous judge, Mr. Justice Hawkins, and a Middlesex special jury. During a trial which lasted nineteen days, and which, owing to adjournments, was in progress for two months and a half, the public interest was excited to a degree scarcely equalled since the notorious Tichborne trials. The simple question at issue was whether the infant plaintiff was or was not the child of the woman who positively swore she was her mother. Round this question there gathered a somewhat complicated story.

Certain property had been left by will to Mr. George Henry Salisbury for life, with remainder to his issue in tail, if he should have any; but if he had no children, it was to go to a Mrs. Archer for life, and her children after her. The property was worth about £1000 a year, but Mr. Salisbury had lived an improvident life and, at the time of his death, was unable to make any substantial provision for his widow. No child had been born to him during his lifetime, and Mrs. Salisbury's position was this, that if a child was born, she would have a considerable allowance for its support during minority. It became therefore a matter of supreme importance for her that a child should be born within nine months from

her husband's death. Her story was that such a child had been born, and if her story was true, the event was a piece of singular good fortune for her.

Mrs. Salisbury was at the time of the trial thirty-eight years of age. She had been rather a pretty girl, and having entered the theatrical profession she succumbed to the temptations which are specially incident to such a life. A child was born to her when she was living in Kensington road, London, and she named it May Montague. Some months after this event she met Mr. Salisbury and was married to him according to Scotch rites. Five months later she was so unfortunate as to have a miscarriage, and subsequently she gave up the stage. Some years afterwards, when she was expecting another child, doubts were suggested as to the validity of the Scotch marriage, and accordingly she and Mr. Salisbury went through the ceremony again before the registrar at Tottenham, England. This was followed by the birth, of a seven months' child, which was still-born. On that occasion no doctor was present, everything being done by a Mrs. Pike, who was a sister of Mrs. Salisbury. Three further miscarriages took place after this, and within eight months of the last miscarriage her husband died at Bridport in the county of Dorset.

Mrs. Salisbury then informed the trustees of the property, through a solicitor, that she was expecting to be confined, and they consented to make her an allowance; provided she would remain at Bridport until the child was born, and give the names of the nurse and doctor who were to attend her. Mrs. Salisbury at first assented to these conditions, but finding that she was being watched by detectives, she resented the suspicions

cast upon her, and left Bridport for London in February. At first she stayed with a Mrs. Crabbe in the northwest of London, but for the alleged reason that the accommodation there was not suitable for a confinement and that she began to expect the child sooner than she had anticipated, she took lodgings elsewhere. For this purpose she selected a house in Kensington road, in the south of London, the same house where her child, May Montague, had been born. The room she occupied was the front drawing-room which had a bed in it. There she and her sister, Mrs. Pike, went to stay on Thursday, February 22nd. Early on the following Saturday morning, according to their story, the child was born, there being no one present but Mrs. Pike, who said that owing to the lock being out of order she was unable to undo the door of the room so as to fetch assistance. About seven o'clock in the morning the door of the room was opened with the assistance of the servant girl, and the baby, a full-time child, was shown to the kind and inquiring landlady. A local doctor saw Mrs. Salisbury during the course of the day and both mother and child were going on satisfactorily. The trustees' solicitor communicated with this doctor, and as a result Mrs. Salisbury consented to a medical examination, provided that Dr. C., whom she knew, was present. Unfortunately, at the time arranged, Dr. C. was taken ill, and when the other doctor wished to make the examination, alone, she flew into a temper at the suspicion that was cast on her, and refused to allow the examination. This was the weakest point in her case, for however angry a woman might be at suspicion, she would on reflection be only too glad to have it removed, if it were groundless. On the other hand, an obstinate and hot-tempered woman might persist in a foolish refusal, as her consciousness of innocence would make her intensely angry at the accusation. She had moreover consented to an examination if

her own doctor were present. He had arranged to come, and his subsequent illness was either an unfortunate or a fortunate event for her.

Mrs. Salisbury's story was a circumstantial one. It was as follows. She said that she first knew that she was in the family way in October, and she then expected the child in April. She talked to her husband on the subject and when her husband was taken ill in January, she told his physician that she would want him to attend her confinement in a few months. On his death-bed her husband asked her to give the child, if it was a girl, the name of Hannah Priestley, and if it was a boy any name she pleased, provided it contained the name Priestley. There was no one present during the conversation, to which Mrs. Salisbury deposed. Her object in coming to London after her husband's death was to save the family pictures—small portraits which had been pledged by her husband, and were going to be sold. She intended to stay only a fortnight, and to go back to Bridport in good time for the confinement in April. Shortly after her arrival in London, she tried to find the nurse who had attended her when May Montague was born. After many inquiries she found her, and asked her if she would go to Bridport about the end of April. She left a card with her address upon it, and this card was produced in court, and was identified by Mrs. Salisbury. On Sunday, February 18, when she was still staying with Mrs. Crabbe, she felt a change in her health and knew that her confinement would soon take place. As Mrs. Crabbe had no suitable accommodation, she took the same room in Kensington road, in which her daughter Monty had been born. She slept there that night with her sister, Mrs. Pike. Next day they drove about London in a cab, looking for a nurse, and did not get back till about nine o'clock in the evening. They went out about ten to get supper. Before returning they had a quarrel and separated. Mrs.

Salisbury returned alone to their lodgings. She got in about 10.30. She was then in pain, and she spoke to the landlady of her condition, as she felt she might be confined suddenly unless she kept quiet. When she got upstairs, she found her sister there already. The servant came twice into the room after their return. The second time she fetched some brandy that she had been sent for, and on her departure Mrs. Pike locked the door. They had no baby clothes with them. In two or three hours the baby was born and was put in a dressing gown. Mrs. Crabbe came next afternoon and helped to wash the baby for the first time. Dr. R. was sent for and came later in the evening. He said it was a full-time child. He continued his attendance till the first of March. This doctor was communicated with by the trustees' solicitors, when Mrs. Salisbury wrote to them that she had had a child, and they suggested that she should be medically examined. She consented to be examined by Dr. R. provided Dr. C., whom she had known for some years, was in attendance. An appointment was accordingly made for March 8, and Dr. R. came on that day but, at the last moment, Dr. C. telegraphed that he could not come. Mrs. Pike telegraphed to Dr. C. at her sister's request, urging him to come, but Mrs. C. wired back that Dr. C. was ill in bed. Mrs. Salisbury would not allow the examination to take place unless Dr. C. was present, and her solicitors then refused to act for her any further. She had the child registered.

In cross-examination she said that she had told the dressmaker who made the mourning after her husband's death to make the skirt and bodice large. There was another room occupied by two persons on the same floor at Kensington road. There was only a narrow landing between the two doors, which were opposite one another. Mrs. Pike rang the bell furiously several times and knocked at the door but no one came. She did not nurse the baby.

Mrs. Pike, whose real name was Jane Lawrence, and who had never been married, was Mrs. Salisbury's principal witness. She said that Mr. Salisbury had said to her on his death-bed that he hoped Mrs. Salisbury would not lose the baby. They drove to Dorchester instead of going to the station at Bridport, when they were coming up to London. Mrs. Pike's explanation of this was that Mrs. Salisbury could not bear to go to the station from which she had taken her husband's body to be buried at Banbury, but she admitted in cross-examination that there were two stations in Bridport.

Mrs. Crabbe said that she noticed Mrs. Salisbury's condition the day she arrived, and asked her about it when she was taking her cloak and bonnet off. She was frequently in the room when Mrs. Salisbury was in her night-dress. This witness's evidence was very strong as to Mrs. Salisbury's condition and formed probably the best part of her case. When she saw the baby on the day when it was alleged to have been born, she thought it a new-born baby. On March 18, Mrs. Salisbury was churched according to the rites of the Church of England.

Mrs. Minnie M'Cann, who lived in the house in Kensington road, said she saw Mrs. Salisbury come in on the night before her child was supposed to have been born, carrying a little dog, but nothing else. On the following Tuesday she saw the child. She was convinced that it was newly-born, and that it was Mrs. Salisbury's.

Mrs. Tidy, who lived near Mrs. Crabbe, was equally convinced of the same thing. She had been in Mrs. Salisbury's room at Mrs. Crabbe's, when the former was only partially dressed. There was a great likeness, she thought, between Mrs. Salisbury and the baby.

A Mrs. Langridge confirmed Mrs. Tidy. So did Mr. Crabbe. Nurse Stuart, who attended Mrs. Salisbury when her daughter Monty was born, and who was asked by

Mrs. Salisbury in February, whether she could attend her in April, was equally convinced.

Theresa Page, the servant at the house in Kensington road, said that she and the landlady did not go to bed till 1.30 A. M. on the eventful morning. She had previously let in Mrs. Pike about a quarter to eleven and neither Mrs. Salisbury nor Mrs. Pike had a latch-key. All the doors were fastened except the front kitchen-door. There was a medium-sized house-dog kept in the kitchen and it would bark if any one approached the doors. The front kitchen door was left open so that it could get out. There had frequently been difficulty with the door of Mrs. Salisbury's room, as it had stuck more than once, and the key had been passed underneath by Mrs. Pike. After Mrs. Salisbury left, a lodger kicked the panel of the door out, and in consequence the lock was mended. On the morning in question Mrs. Pike passed the key underneath.

Mrs. Nuttall, a laundress, said that she had known the Salisburys a long time and had been asked by Mr. Crabbe to send to Kensington road for Mrs. Salisbury's washing, and she did so though she did not usually send so far.

Mrs. Salisbury had apparently persuaded her husband before his death that she was about to have a child, for an independent witness, who had read of the case in the newspapers, came forward and stated that Mr. Salisbury had said to him in the course of conversation that he hoped it would be a boy. Another witness, a jobmaster, proved that Mr. Salisbury had obtained the loan of his dog-cart to take Mrs. Salisbury home, as she could not walk on account of her condition, and Mr. Salisbury had actually drunk "the youngster's health" with him.

The wife of a fisherman near Bridport told of Mrs. Salisbury having got freshwater eels from him on account of her condition. The witness said that it was a well-

known thing for women to have fancies of this sort. This witness, as well as several others, spoke of the resemblance between the baby and Mr. Salisbury. Several persons stated that shortly before Mr. Salisbury's death they had noticed signs indicating that his wife was going to have a child. This was the case presented on behalf of the plaintiff, and certainly a most extraordinary case it was.

Sir Edward Clarke, Q. C., M. P., then, as now, the greatest advocate at the English bar, had been retained for the defendants. He pointed out that the case was clearly one to be resisted, and that if the child was really Mrs. Salisbury's, no two persons could have taken more pains to throw discredit on the claim they had made, than these two women had done, and, said the learned counsel, we hope to be able to show before the conclusion of this case, where the child was obtained from.

Sir Edward's prediction was fully realized. Dr. C., who was ill and absent from home and whose address was for some time unobtainable, was at length examined, and his testimony was to the following effect: Mrs. Salisbury went to him in February, 1894, and told him she desired to adopt a child. On February 19 he was called in suddenly to attend a young unmarried girl in her confinement. Mrs. Salisbury called on him a day or two afterwards and he drew her attention to the birth of this child. He had already told the mother of the girl that he knew some one who would adopt the child if her daughter was willing. To either Mrs. Salisbury or her sister he gave the address. After the legal proceedings commenced, Mrs. Salisbury asked him to assist her to establish that the child was hers, but he refused to do anything of the kind.

It appeared that Dr. C. had refused to give the name and address of the girl who gave birth to the child. He had furnished the plaintiff's solicitors with a proof of his evidence, in which he stated shortly the fact

of the birth, and that Mrs. Salisbury had previously gone to him and inquired for a child to adopt. He had been asked for exact details, in order that inquiries might be made by those representing Mrs. Salisbury. He had however refused to give any details beforehand, the result being that plaintiff's counsel did not call him. His evidence was therefore taken at the instance of the defendants, who did not however know what the details of his evidence would be.

The girl whom Dr. C. attended, and her mother also, gave evidence, and it appeared that on the evening before Mrs. Salisbury's alleged confinement a woman had come to the door and asked for the child, whereupon the girl's mother brought it downstairs and gave it to the woman. She could not however identify or describe this woman in any way.

The result of the doctor's evidence was that Mrs. Salisbury's leading counsel threw up his brief. His junior however continued to conduct the case alone.

Mrs. Ashe was another important witness for the defendant. She told how Mrs. Salisbury had asked her if she knew anyone who was going to have a baby and would like to have it adopted. Mrs. Salisbury wanted her to pretend to be the nurse, and to be in the house when Mrs. Pike arrived with the child, so that she could let Mrs. Pike in and no one else would see the baby. Mrs. Ashe however would not allow herself to be mixed up with anything of the kind.

Dr. R. told how Mrs. Salisbury had refused to be examined after her alleged confinement.

The last witness gave some interesting

testimony. She was a Mrs. M., who had apartments in the house where the illegitimate child was born, and who had charge of it while it remained there. When it was taken away, she went out and watched. She saw a woman in a loose garment leave the house. The witness followed and the woman took a hansom. The witness took another and gave chase. The hansom containing the unknown woman drove round and round the squares on the east side of Edgeware road, and ultimately reached Praed street by a devious route. There the woman got out, and the witness, being weak and tired, lost sight of her in the crowd. The baby got a sleeping draught that evening, the witness added; and this would account for the silence in the early part of the night at the house in Kensington road.

The learned judge certainly did not sum up in favor of the defendant, but the jury after consideration gave him their verdict, finding that Mrs. Salisbury was not the mother of the infant plaintiff. So ended one of the most extraordinary cases tried in England in recent years. Few or none of the incidents relied on by the plaintiff were in themselves incredible, and considerable ingenuity had been displayed in concocting a plausible story. But while each of the main facts might have been accepted, had it stood alone, the occurrence of all of them was a coincidence too remarkable for belief. It is true that the identity of the suppositious child was not absolutely traced, but no one who has read the evidence can doubt that the decision of the jury was a sound one.



FEDERAL JURISDICTION IN EQUITY.

DOCTRINE THAT THE FEDERAL COURTS MAKE THEIR OWN RULES OF PROPERTY AND OF SUBSTANTIVE RIGHT IN EQUITY PROCEEDINGS WITHOUT REGARD TO THE LAWS OF THE STATES.

BY SEYMOUR D. THOMPSON.

IN *Burdon etc. Refining Company v. Ferris Sugar Man. Co.*,¹ it was held by Mr. Federal District Judge Parlange, sitting at circuit in equity, that the circuit court of the United States may, when so sitting, charge an equitable lien upon the assets of an insolvent in the course of judicial administration, although no such right of lien may exist under the law of the State, and although the effect of creating it may be to displace the claims of general creditors who, under the State law, would otherwise be entitled to a ratable distribution out of the assets of the insolvent. This decision was affirmed by the supreme court of the United States.²

In a later case, a bill in equity was filed in a State court in Minnesota praying for the cancellation of certain notes and a mortgage securing them, on the ground of usury. Under the law of Minnesota, as construed by the courts of that State, the plaintiff was entitled to this relief, and without tendering or paying into the court what was actually due from him to the holder of the notes and mortgage, together with lawful interest. The suit was removed by the defendant into the Circuit Court of the United States, and the court granted the relief prayed for, declaring the notes and mortgage to be void, and enjoining the defendant from taking any action or proceeding to enforce the same.³

On appeal to the United States Circuit Court of Appeals, this decision was affirmed, Judges Caldwell and Thayer voting to affirm, and Judge Sanborn dissenting in a terse and

vigorous opinion, on the ground that, in cases in equity the courts of the United States are not bound by the statutes or rules of decision of the particular State in which the suit may have arisen, and that in this particular case the plaintiff did not offer to do equity, by paying into the court what was justly due for the principal and lawful interest of the loan which he had received from the defendant.¹

The Supreme Court of the United States have lately affirmed this decision without dissent, proceeding on the ground that usury is a statutory offense, that the object of the suit in equity was to secure the relief afforded by the statute law of Minnesota, and that, in dealing with a question thus arising, the courts of the United States must be governed by the laws of the State where the transaction took place, and must follow the construction put upon those laws by the courts of the State.²

It is submitted that the Supreme Court, and Judges Caldwell and Thayer, are right upon principle, but that Judge Sanborn is right according to previous authority. Section thirty-four of the Federal Judiciary Act contains this provision: "That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision *in trials at common law* in the courts of the United States, in cases where they apply." On the other hand, the original Federal Process Act

¹ 78 Fed. Rep. 417.

² *Burdon etc. Refining Co. v. Payne*, 167 U. S. 127.

³ *Krumseig v. Missouri etc. Trust Co.*, 71 Fed. Rep. 350.

¹ *Missouri etc. Trust Co. v. Krumseig*, 77 Fed. Rep. 32; s. c. 22 C. C. A. 1.

² *Missouri etc. Trust Co. v. Krumseig*, 172 U. S. 351.

of 1792, Chap. 36, Sec. 2, enacts that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as distinguished from courts of law.

That the readers of this paper may clearly see that we have in equity cases — and nearly everything can be turned into equity — a system of law above the laws of the States, I subjoin a few quotations from decisions of courts of the United States. As early as 1818 the Supreme Court of the United States took the view that, to effectuate the purposes of the Federal Judiciary Act, "the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." And it was reasoned that if the equity jurisdiction of the Federal courts were to be restrained to the same jurisdiction as existing in the States, in some of the States it could not be exercised at all, since at that time some of the States had not adopted the English chancery system.¹

Still later, in the year 1819, in a case in equity arising in the United States Circuit Court for the District of Massachusetts, the court, speaking through Chief-Justice Marshall, said: "As the courts of the Union have a chancery jurisdiction in every State, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States."²

In the same year it was held by the same court that the courts of the United States in equity might enforce the lien of a vender for unpaid purchase money, although there might be no such remedy in the State courts.³

¹ Robinson v. Campbell, 3 Wheat. (U. S.) 211, 222.

² United States v. Howland, 4 Wheat. (U. S.) 108, 115.

³ Brown v. Gilman, 4 Wheat. (U. S.) 255, 290. The jurisdiction of the court was assumed to exist, without discussion.

In 1832, Mr. Justice Story, in giving the opinion of the same court, said: "The chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the State practice; but the Act of Congress of 1792, chapter 36,¹ has provided that the modes of proceeding in equity suits shall be according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is that the remedies in equity are to be administered, not according to the State practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of Congress, and to such alterations and rules, in the exercise of the powers delegated by those acts, as the courts of the United States may, from time to time, prescribe." The effect of an injunction granted by the Circuit Court of the United States was, therefore, to be decided apart from the statutory enactments of the State in which the controversy depended.²

In 1843, Mr. Justice Story, sitting in a case at equity at circuit, said: "It has been long since settled in the courts of the United States that the equity jurisdiction and equity jurisprudence, administered in the courts of the United States, are coincident and coextensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular State where the court sits."³

In another case in equity before the same justice, at circuit in Pennsylvania, it was objected that the plaintiffs were not entitled to

¹ Referring to § 2 of the statute known as "the Process Act."

² Boyle v. Zacharie, 6 Pet. (U. S.) 648, 658.

³ Fletcher v. Morey, 2 Story (U. S.) 555, 567.

maintain their bill to redeem from certain mortgages, because they had not made a tender of the money due thereunder." "To this," said the learned justice, "the true answer is that the regulation respects suits in the State court only, under that particular statute, and is wholly inapplicable to the general equity jurisdiction of the courts of the United States, which can in no manner be limited or controlled by State legislation."¹

In a case coming into the Supreme Court of the United States from the United States Circuit Court in Kentucky, the court applied the rule of equity that a deed, absolute on its face, may be shown by parol evidence to have been intended as a mortgage merely. In the opinion of the court, written by Mr. Justice Curtis, the following language occurs: "It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted or rejected, not by the mere force of any State statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles."²

A rule that allows a party, by parol evidence, to show that a deed absolute on its face was intended as a mortgage, must be regarded as something more than a rule of evidence or of procedure merely, but as a rule of property. If this is true, the court here refused to follow a rule existing in a State upon which the security of titles to land rests. But this is a settled part of the doctrine. Except in the *Krumseig* case, already referred to, the writer finds no suggestion in any of the Federal decisions that, in the exercise of their equity jurisdiction, the courts of the United States are bound to follow the rules of property existing in par-

ticular States, whether enacted by the legislature or established by judicial decision.

In another case, where the question of jurisdiction was the only question considered, the court, speaking through Mr. Justice Campbell, said: "In the organization of the courts of the United States, the remedies at law and in equity have been distinguished, and the jurisdiction in equity is confided to the circuit courts to be exercised uniformly through the United States, and does not receive any modification from the legislation of the States, or the practice of their courts having similar powers."¹

Following the question down chronologically, we find that, in 1862, the Supreme Court of the United States, speaking through Mr. Justice Swayne, said: "The equity jurisdiction of the courts of the United States is derived from the constitution and the laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. This court is invested by law with the authority to make such rules. In all these respects they are unaffected by State legislation."²

Still later, the court, speaking through Mr. Justice Davis, said: "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of the different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.'³ If legal remedies are sometimes modified to suit the changes in the laws of the States and the practice of their courts, it is not so with equity. The equity jurisdiction conferred on the Federal courts is the same that the High Court of

¹ *Green v. Creighton*, 23 How. (U. S.) 90, 105.

² *Noonman v. Lee*, 2 Black (U. S.) 499, 509.

³ Citing to this quotation, *Hyde v. Stone*, 20 How. (U. S.) 175; *Suydam v. Broadnax*, 14 Pet. (U. S.) 67; *Union Bank v. Jolly*, 18 How. (U. S.) 503.

¹ *Gordon v. Hobart*, 2 Sum. (U. S.) 401, 403.

² *Russell v. Southard*, 12 How. (U. S.) 139, 147.

Chancery in England possesses; is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union. The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief."¹

In a still more modern case it was said by Mr. Justice Harlan, speaking for the court: "While the courts of the Union are required by the statutes creating them, to accept as rules of decision, in trials at common law, the laws of the several States, except where the Constitution, laws, treaties and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different States in which they sit."²

I have made these quotations at the expense of repetition to emphasize the Federal doctrine on this subject, and to show the great uniformity with which those courts have asserted a jurisdiction in equity entirely above the laws of the States, whether judge-made or statutory. It is not very material to inquire whether the decision of the Supreme Court of the United States in the *Krumseig* case is a departure from these principles. While the court, in a proceeding in equity, enforced the statute of Minnesota against usury, as construed by the Supreme Court of that State, in the most severe manner, by ordering the cancellation of the notes and mortgage, without compelling the plaintiff to pay into Court what was justly due with lawful interest, thus confiscating the whole debt,—yet I do not see in the reasoning of the court any purpose to depart from this settled rule of Federal jurisdiction. It merely exercised its jurisdiction so

as to enforce the local law in that particular case, as it had the unquestioned power to do.

But a survey of the whole subject may well lead to some serious inquiries: Why should there be, on this subject, one rule for cases in equity and a different rule for cases at common law? Why, in other words, should the courts of the United States be allowed to erect their own system of jurisprudence in disregard of the laws of the States in cases in equity, while being bound by those laws—a command which they constantly neglect—under the thirty-fourth section of the Judiciary Act in cases at common law? Why should the alien, the non-resident citizen, and what is still worse, that spurious and fictitious "citizen" which exists in the form of the "tramp corporation," whose citizenship is founded upon an unfaithful interpretation of the Constitution and Judiciary Act, be allowed the privilege of having their controversies adjudicated according to a system of law which is not available to the domestic citizen, and in courts whose doors are shut to him? Why, for example, if Judge Sanborn's view had prevailed in the *Krumseig* case,—and, considered as a mere question of jurisdiction, I have shown that it might easily have prevailed,—should the Missouri corporation, lending money in Minnesota at usury, by the device of removing the cause from the State to the Federal court, have acquired the right to lose no more than the usurious excess over lawful interest, while the citizen of Minnesota, making precisely the same contract, must forfeit the whole debt, principal and interest?

Why, in framing the Judiciary Act, the Federal courts were required to conform to the rules of law existing in the particular States in cases at common law, but were not required so to do in cases in chancery, may not be clear to men of our day, unless it is considered that when the Federal judiciary establishment was formed, several of the States, notably Massachusetts and Penn-

¹ *Payne v. Hook*, 7 Wall. (U. S.) 425, 430.

² *Kirby v. Lake Shore, etc., Railroad*, 120 (U. S.), 130, 137.

sylvania, had no system of equity, not having adopted the English Chancery system, which was regarded by our ancestors with odium as being unfavorable to liberty. The courts of the United States, in cases at law, constantly disregard the command of Section 34 of the Judiciary Act, refuse to conform to the "laws of the several States," with respect to what they are pleased to call "general jurisprudence," which is a body of law which they have built up for themselves, to be administered as between citizens of different States whose accidental circumstances of residence give the Federal courts jurisdiction of actions and suits between them; and, as already shown, in cases in equity, they have generally disclaimed any obligation to follow either the rules of substantive right, statutory or case-made, prevailing in the States where the cause of action arose, but have asserted that they administer a system of equity uniform throughout the United States independently of State decisions; with the result that, in many of the States, they erect a different kind of law from that enacted by the legislature of the State or settled by its local adjudications; so that an alien or a citizen of another State, when suing a citizen of any particular State in equity, and often when suing him at law, has the advantage of being *above the law* of that State. The rule not only works the incongruity of erecting *two kinds of law* in the same State, according to the forum in which the action is brought, but it works the gross injustice of giving to the alien, or to the citizen of another State of the Union, an advantage in litigation over the domestic citizen. Under this rule the alien, or the citizen of another State, can choose the forum according to the law which is the most favorable to him, and the domestic citizen, who is the defendant in the action, must submit to the choice. For instance, a citizen of New York, who thinks he has a cause of action against a citizen of Louisiana, will cast about to find out what the local law of Louisiana

is, with reference to his claim, and what the rule of the courts of the United States is with reference to the same matter; or what their "general jurisprudence" is with reference to it. He may be able to recover under the Federal rule and not under the local law, and he will select the Federal forum, override the law of the State, and prosecute his demand to success. On the other hand, he may find that the rule administered by the courts of the United States in equity will preclude his recovery, but that the local law of the State will allow him to recover; and he will therefore bring his action in the State court and prosecute it to success. No such advantage of choice is allowed the local citizen.

Now, when we consider that the laws of many of the States allow every kind of business to be incorporated, even farming, and with the smallest appreciable capital, as will appear by an examination of the new statute of Delaware; and when we further consider that, for the purposes of Federal jurisdiction, every corporation is conclusively presumed to be a "citizen" of the State under whose laws it is incorporated, without reference to the real residence of its corporators or members, so that the country literally swarms with fictitious "citizens," artificially created under the laws of New Jersey, West Virginia, Delaware and other States, by citizens residing outside of those States, for the purpose of doing business in the States of their residence, — we see that, under this rule of Federal jurisdiction, these dishonest corporations enjoy an advantage in litigation over honest citizens. This abuse of having two kinds of law, of which the dishonest corporation may take its choice while the honest citizen cannot, has grown to enormous proportions and demands the immediate action of Congress. Opinions differ as to the form which that action should take. Many believe in laying the axe at the root of the tree and in repealing the whole structure of Federal jurisdiction based upon diverse state citi-

zenship, except in cases where local prejudice is clearly shown.

Public attention has not yet been drawn to the fact that it is upon this structure of an independent or Federal jurisdiction in equity, that what is called "government by injunction" is chiefly built. The protection of property or business from criminal trespasses, according to all just conceptions, concerns only the municipal laws of the States. But within the last twenty years it has been to a great extent transferred from the conusance of the grand juries and criminal courts of the States, to that of the circuit courts of the United States, sitting in equity. In administering this jurisdiction, these judges, as we have seen, administer a law of their own creation. In administering it, they exercise a jurisdiction and they proceed with a course of conduct in respect of which they are not in any sense responsible to the people; for, in language employed by Mr. Jefferson, with reference to them more than three-quarters of a century ago, "impeachment has long since ceased to be a scarecrow." Thus it is that a people, supposedly free, are governed by the only branch of their governmental establishment which is in no sense responsible to them. It is in vain that they protest; it is in vain that they enact in their legislation and ordain in their constitutions that their criminal laws shall be enforced by the indictments or presentments of grand juries and by trial by jury, surrounded by the constitutional guarantees which protect that mode of trial, instead of by injunctions followed by process of contempt, which is an inquisitorial procedure derived from the Roman law, in which the accused is arraigned before the

judge alone, presumed to be guilty until he proves himself innocent, compelled to answer interrogatories, and thus to "purge himself" of the offense which is charged against him, just as Dreyfus was compelled to do before a French court-martial. Nor is this "government by injunction" as administered in the Federal courts directed against the humble classes alone: it is leveled against all classes, from striking laborers to sovereign States. By this process the States themselves are sued, in the face of an amendment to the Federal Constitution, withholding from the Federal courts jurisdiction of suits against them. By this means their political action is arrested and controlled by the Federal courts; and within recent periods we have seen the spectacle of States which were once called sovereign, through their departmental officers, by whom alone they can exercise their powers, hauled up for trial and sentence before the Federal district judges. Nor is it at all difficult for the Federal courts to obtain jurisdiction, on the ground of diverse state of citizenship, of suits of this character. The easy device of transferring a few share certificates, or a few corporate bonds, to a non-resident, is sufficient to achieve this result, — a spectacle which we see enacted every day.

To all this it may be replied that "government by injunction" is better than no government at all — better than anarchy. That is unquestionably true; but it is not to be overlooked that, in its practical application, the statement that it is necessary to resort to Federal writs of injunction to enforce the criminal laws of the States, involves a total impeachment of the sufficiency of popular government.

EXECUTIONS AND EXECUTIONERS.

BY JOHN DE MORGAN.

FROM the remotest times to the present day the nations of the world, civilized and barbarian, have, with rare exceptions, maintained that the death penalty was absolutely necessary. While philanthropists and philosophers have argued against it, the governments have adhered to it, and so at the end of the nineteenth century we find capital punishment enforced in nearly all nations.

It is not my intention to discuss the policy of either the retention or the abolition of the death penalty, but rather to show the different modes of inflicting the punishment and the character of the men who have been entrusted by the governments with its execution, for if there were no executioners there could be no executions.

In modern times the death of the criminal is brought about by hanging, electrocuting, beheading or strangling, but in olden times the civilized nations resorted to the most horrible tortures and painful methods which cause a feeling of horror to pass over us as we recall them. It may be that before the end of the twentieth century the guillotine, the hangman's rope, the garrote and the electric chair will be looked upon with the same abhorrence as we now feel when we recall the barbarous devices employed in times past.

The death penalty was the punishment, in England, for all felonies, and the certain doom of those who could not avail themselves of *privilegium clericale*, i.e., the common law inflicted death on every felon who could not read, and that punishment was implied where a statute made any new offense felony.

In the reign of Henry VIII, there was scarcely a department of human conduct over which the gallows did not bear its

frightful sway. During his reign seventy-two thousand persons suffered the death penalty, some being hanged, others beheaded, many burned to death and quite a number boiled. Queen Elizabeth only signed the death warrants of four hundred annually, but even Parliament complained of the "daily happenings of horrible murders, thefts and other great outrages," and asked consent to increase the number of crimes for which death was the penalty. We find the following preamble of a law passed in Elizabeth's reign:

"WHEREAS, persons, in contempt of God's commands, and in defiance of the law, are found to cut pockets and pick purses even at places of public execution, while execution is being done upon criminals, — be it therefore enacted, That all such persons shall suffer death, without benefit of clergy." — (Stow's Annals.)

James I hanged and burned thousands for alleged witchcraft and other imaginary crimes, while Charles II used the headsman on every possible occasion. Between the accession of William of Orange and the death of George II, no fewer than one hundred thousand persons met their death at the hands of the executioner. The first years of George III's reign were characterized by ferocity and remorselessness. Not only were the old laws revived, but new ones enacted to an extent we can scarcely credit. Shoplifting to the amount of five shillings, consorting for a whole year with gipsies, breaking down the head of a fishpond, cutting down an ornamental tree in a public park or street, coining, sheep-stealing, horse-poisoning, forgery, returning from transportation, damaging Westminster, London or Putney bridges, breaking any tools used in woolen manufactures, stealing apples growing in an orchard, exporting a ram and

ewe together out of England, cattle stealing, stealing in a dwelling house, highway robbery, bigamy, stealing geese from a common, stealing linen from a bleaching ground, letter stealing, cutting and maiming, damaging the rail or chain of a turnpike gate, cultivating the tobacco plant in England, rioting, larceny and poaching were all punished by death under the laws passed in the reign of George III.

During this period a girl, fourteen years of age, was condemned to be burned alive for an offense under the coining act. In 1788, a woman was burned to death in front of Newgate for a similar offense. A news-



EXECUTION
IN ANCIENT MEXICO.

paper thus describes the scene: "As soon as she came to the stake, she was placed upon the stool, which after some time was taken from under her, when the fagots were placed round her, and, being set fire to, she was consumed to ashes." In the same year, Mary Jones, a young woman whose husband had been impressed as a sea-

man, and who had through that circumstance been reduced to absolute starvation from comparative respectability, was hanged at Tyburn for stealing two yards of yellow calico, her infant sucking at her breast on the way to the scaffold.

Treason and murder are now the only crimes punishable by death in Great Britain and her colonies. The infliction of the death penalty for high treason was always barbarous, the judge sentencing the criminal to be drawn on a hurdle to the place of execution, and there hanged, his body to be cut down whilst alive, his entrails taken out and burned before his face, his head to be

cut off and his body quartered, the head and quarters to be at the disposal of the crown. This barbarous penalty remained on the statute book until 1870, when ordinary hanging was substituted.

In Great Britain and her colonies the criminal is hanged; in France he is decapitated by the guillotine; in many of the German States beheading is also the mode of execution, while in Spain the death penalty is by means of the garrote, and in New York the more scientific but equally deadly electric current is made the instrument of the State in executing those condemned to death.

The Spanish garrote was undoubtedly adopted from the Moors and retained ever since by the least progressive of civilized nations. At first it consisted in simply placing a cord round the neck of the criminal, who was seated on a chair fixed to a post, and then twisting a cord by means of a stick inserted between it and the back of the neck, till strangulation was produced. The name is derived from *garrote*, a stick or cudgel. The inquisitors were wont to grant as a favor this mode of strangulation, before being burned, to such condemned persons as recanted. If the executioner was unskilful the pain was sometimes very great. Llorente, in his "History of the Inquisition," mentions that at an *auto-da-fe*, at Cuenca, a poor Jew, who had obtained this dismal privilege of preliminary strangulation, noticing the bungling manner in which the executioner had performed the operation on the two who preceded him, said to the latter: "Peter, if you are likely to strangle me so clumsily, I would much rather be burned alive." The original garrote has given place to a brass collar containing a screw, which the executioner turns until its point enters the spinal marrow where it unites with the brain, causing instantaneous death.

Among the forms of death ordered in France there were several which were barbarously cruel. In 1336 Count de Rouci

was flayed alive, for betraying Laon into the hands of the English. Francis I invented a death punishment known as *Estrapade*, which consisted in letting the culprit fall from such a height as to break all his limbs. At the time of the revolution there were five forms of capital punishment in France. Traitors and regicides were quartered, sorcerers and heretics were burned; for ordinary criminals there were the gibbet and wheel for men of low degree, and the axe for the noble, for decapitation involved no loss of rank and no dishonor to the family.

The last execution by breaking on the wheel took place in France in 1789, though several have suffered the torture and death in Germany during the present century. The criminal was placed on a carriage wheel, with his legs and arms extended along the spokes, and the wheel being turned round, the executioner fractured his limbs by successive blows with an iron bar, which were repeated till death ensued. Sometimes the executioner was permitted to terminate the sufferings of the condemned by dealing two or three severe blows on the chest or stomach, known as *coup de grace*, and occasionally, in France, the sentence contained a provision that the criminal was to be strangled after the first or second blow.

In France, regicides and traitors were subjected to the greatest torture. An eye-witness describes the death of Robert François Damiens, on March 28, 1757, his crime being that of slightly wounding Louis XV with a knife. "A sort of thrill running through the assembled thousands, a sudden silence, preceded the appearance on the square of a pale, slender man, who advanced surrounded by guards and officers of justice," writes the eye-witness. The lugubrious procession stopped near the centre of the square now known as the Place de l'Hôtel de Ville. "The prisoner, for such he was, was stripped, bound, ironed, and laid upon a scaffold in the centre of the palisades. Then followed the most hor-

rible scene the imagination can conceive. The right hand of the prisoner, which held a knife, was burned. He uttered a terrible cry as the member crackled in the blaze, and was then silent and looked at the charred stump with mournful attention. Then the



EXECUTION AT TANGIERS.
(From painting by Regnault.)

executioner tore out pieces of flesh from his breast, arms, and legs, and poured into the flesh a mixture of melted lead, boiling oil, hot pitch, wax and sulphur, at which the criminal cried out at several intervals: 'My God! Strength, strength!' 'O Lord, my God, have pity on me!' 'O Lord, my

God, how I suffer!' 'Lord, my God, give me fortitude!' As during the burning of his hand, he uttered cries at the infliction of each fresh torture, then became calm and silent, and patiently contemplated his wounds. Four young and vigorous horses

mains were thrown upon a pile of wood and burned to ashes. The punishment had lasted hours, and night closed upon the horrible scene."

Count Lally-Tollendal just escaped this terrible death, the verdict of the court ac-



LAST TOILETTE OF CHARLOTTE CORDAY.
(From painting by E. M. Ward.)

were then harnessed to his limbs, but, though they pulled with all their might, and though the extension of the members was prodigious, they did not succeed in quartering the sufferer until the surgeon's knife had scored the joints. The victim lived till the last limb was torn from his body, and then only gave up the ghost. His mangled re-

quitting him of high treason, but pronouncing him guilty of "having betrayed the interests of the king, of the state, and of the East India Company." The decree ordered him to be beheaded. Louis XV, whom Lally had served so faithfully for fifty-one years, was petitioned by the army, by his own attorney-general, by one of the judges

who tried Lally, and by an immense number of people, to pardon the condemned, but in vain. When the executioner presented himself with the order to gag him, he asked to be allowed to die as a nobleman of France, but his request was denied. Crowds assembled to witness the execution, including representatives from foreign nations. Many men of the very first rank in Paris sought and obtained permission to be present on the scaffold, in order to witness the decapi-

enough as near as now during my fifty-one years' service for the king, and do they think I am going to resist?"

"Monsieur le comte, it is the custom."

The executioner gave the heavy sword to his son, Charles Henri Sanson, the count laid his head on the block, the weapon was raised, but just at that moment the crowd pressed forward to see the death blow given, and the executioner was pushed so that the blow fell on the thick hair which had been



GIRONDISTS ON THEIR WAY TO THE GUILLOTINE.
(From painting by Carl Piloty.)

tation of their friend. When the condemned reached the scaffold, in a cart, instead of his own carriage, as had been promised, the gag was removed, but the cords which bound his hands behind his back were kept tied. Looking at young Sanson, who was assisting his father, he said:—

"Young man, free me from these bonds."

"Monsieur le comte, your hands must remain behind your back."

"Is it, then, necessary to tie my hands to cut off my head. I have seen death often

raised, and the skull was split. Lally jumped to his feet and was about to speak, when the elder Sanson took the sword from his son's hand, and with one blow severed the head from the body. The priest who attended the unfortunate Lally wrote to the bereaved family, "He received death like a hero, and was penitent like a Christian." The sword which the executioner used on that occasion was for many years a principal ornament of the museum of M. Sanson, the official executioner, and was always exhibited to the

visitors, whose attention he directed to a notch in it caused by its encountering the victim's teeth. It is interesting to know that twelve years later a memorial was presented to Louis XVI in council by Count Lally Tollendal, son of the unfortunate

instated by law, his character pronounced to be restored to honor, and the verdict of public opinion, which had always been in favor of the eccentric Lally, was approved.

A more remarkable vindication after execution was that of Jeanne d'Arc, The Maid of Orleans, who, twenty-five years after she had been burned at the stake, was formally pronounced to have been innocent.

When the States-General of France organized as the National Assembly, a name implying that in future there should be no class distinction or division, a member, Dr. Guillotin, urged that capital punishment should be brought to a democratic level, and that noble, heretic, traitor and ordinary murderer should meet death in the same way. He had perfected a machine for decapitation, taking for his model the old Scotch instrument of death, known as the "Maiden." Guillotin declared that decapitation by his machine would be speedy and painless, and in his speech he humorously asserted that it "would take off a head in a twinkling," and the victim feel nothing save "a sensation of refreshing coolness." The machine was adopted and has ever since borne the name of its proposer. Many of the members who had voted for its adoption met their death on its platform. It has proved a democratic machine, for king, queen, men of great

culture and those of low degree, philosophers and hardened criminals, dainty ladies and the lowest of the *femmes du paré* have died on the same plank.

How the Scotch machine received the name of the "maiden" is not known, the commonly received conjecture being that it



MADAME ROLAND AT THE GUILLOTINE.
(From painting by Royer.)

Lally, in consequence of which a commission was appointed to examine into the whole case of his father. After thirty-two sittings, the commission "reversed the decree of the 6th of May, 1768, and everything that had followed it." From that moment General Lally Tollendal was re-

was so called from a pleasantry similar to that of one of its last victims, the Earl of Argyle, who, as he ascended the scaffold in the year 1681, protested that it was "the sweetest maiden he had ever kissed."

"the virgin." This machine was the one taken by Dr. Guillotin as his model and improved on by him. The guillotine is composed of two upright posts, grooved on the inside and connected at the top by a cross beam. In these grooves, a sharp steel blade, placed obliquely, descends by its own weight on the neck of the victim who is bound to a board laid below. The speed and certainty with which this machine separates the head from the trunk, gives it a great superiority over the axe and sword.

During the Reign of Terror the guillotine was in hourly use. Every morning the cart with its broad wheels and springless body rumbled over the stones to the *Place de la Concorde*, the place of execution, and each morning the victims were crowded in the cart in a manner that would not have been allowed if dogs had been the occupants. The people shouted and sang ribald songs, they insulted the victims and jeered as the cart rumbled along. It was all done in the name of Liberty, and one can well exclaim with Madame Roland, as the executioner was tying her hands behind her back, her face towards the statue of Liberty, "O Liberty! how many crimes are committed in thy name."



MARIE ANTOINETTE ON HER WAY TO THE GUILLOTINE.

Thomas Scott of Cambusmichael, one of the murderers of Rizzio, was beheaded by the "maiden" in the year 1566. Some facetiously called this machine the "widow," and in the north of England it was often spoken of as

It has been said that Marie Antoinette dreaded the ride to the place of execution more than the death she was to meet. Calmly she waited in the Hall of the Dead for the executioner. She wore a white dress, a white handkerchief over her shoulders, her

hair surmounted by a cap tied with a black ribbon. When M. Sanson, the executioner, entered, she asked if she could not be conveyed to the guillotine in a covered carriage, but was told that it was contrary to the law. "I am ready, then, gentlemen. We can set out." — "But, madame, your hair!" — "I have had it cut, see if it is right." With true courage she had cut the hair short rather than allow it to be done by an assistant of the executioner. Only for one moment did she tremble, and it was when she stepped into the rude cart, the Abbé Lothringer by her side. To her his presence was an insult, for he had abjured his allegiance to his king, and joined the successful revolutionists. Her own father confessor was not allowed to be with her, or to give her absolution. As the cart moved through the crowded streets the people hissed, and gave derisive cheers for "the Austrian." Marie Antoinette stood erect in the cart and her eyes flashed with defiance. "Have courage, madame," whispered the priest. "Thank you, sir," was her only reply. The cart stopped a little distance from the guillotine, and the executioner offered his arm to the condemned queen, but she declined his assistance and walked up the steps of the scaffold unaided. Someone shouted to the executioner to hold up the head of the Austrian so that all might see. It was a ghastly sight to see the blood dripping from the white neck, and falling over the side of the guillotine on the crowd beneath. Many a handkerchief was stained with the life blood of the unfortunate queen, and the mere possession of one of those stained articles was sure to win high regard. The head and body were placed in a coffin filled with quicklime, and buried in the same ground as the felons and unclaimed dead of the great city.

No sooner is the sentence of death pronounced in France than the criminal is taken to the adjacent Conciergerie. Surrounded by guards, he is taken to a cell with two beds, of which one is to be occupied by a

fellow captive, of the class known in prison parlance as *moutons*. Here he is divested of his attire, and forced to don the prison suit of rough canvas shirt, woolen trousers and felt shoes. No necktie is allowed, lest he should succeed in strangling himself. A straight waistcoat of strong canvas, opening behind and secured with leather straps, is next put on, in spite of all resistance or intreaty, and the long sleeves are attached to a cord which passes round the thighs, so that he cannot raise his hands above a certain height or perform the simplest acts without assistance. This *camisole de force* is never once removed during the period which precedes his execution. When the day of execution arrives the prisoner is divested of his clothing and made to resume the dress which he wore at his trial. The *camisole de force* is then replaced, and an officer guides him along the passages and up the steps of the guillotine. The almoner takes his last farewell, to return only after the head has fallen and then to render the last office to the corpse. The crowds shout derisively, the men will make bets as to the victim's courage, and his calmness at the moment of death. In the midst of the excitement the knife falls, the head drops into the basket, and the crowds disperse; the body is taken to the Champs des Navets, where those who have died on the scaffold lie side by side with the paupers and the unclaimed dead from the Morgue. The executioner washes the blade and carefully oils it to prevent rusting.

In England, after the days of the headsman and his axe, the condemned were executed by hanging. Until 1860 the hangings were in public, the idea being that the scene would have a deterrent effect, but experience proved the contrary; the execution was looked upon as a rare show and high prices were paid for available windows.

All classes flocked to the scene and history furnishes us with many instances of persons of cultivated mind regularly attend-

ing executions. George Selwyn never missed attending, and, while quite a young man, he journeyed to France to see the execution of Lally Tollendal. Boswell had a passion for executions and often obtained permission to ride from the jail to the place of death with the condemned. He told Johnson how he rode to Tyburn with Hackman, a murderer, and of the enjoyment it gave him.

On one occasion he was so excited that Johnson asked him what good thing had befallen him, "I saw fifteen men hanged this morning," was his reply.

The night preceding the early morning execution was spent in debauchery. Thieves and the lowest criminals looked forward to an execution with considerable pleasure, and were encouraged to acts of violence and debauchery by the rich men who were at the windows.

So far from being a deterrent, it was found that out of one hundred and sixty-seven capital convicts who were ministered to by the Rev. Mr. Roberts, of Bristol, England, one hundred and sixty-four had been present at executions, and some frequently.

At one time the body after death was surrounded by fagots of wood, which reached over the head of the corpse, and were then lighted, the corpse being burned to ashes. At a later period the criminal was hung in chains, so that the gradual decay might be seen by passers-by and act as a warning to evil doers. The practice of gibbeting was restored by Parliament in 1831, and in 1832 two men were hung in chains, one at Yarrow-on-Tyne and the other at Leicester. Thousands of persons flocked day after day to these gibbets, tents were erected on the ground for drinking, dancing and card playing, and on Sundays the spectacles

were so bad that Parliament quickly repealed the act, and the bodies were ordered to be removed and buried in quick lime. At one time the bodies of murderers were given to professors of anatomy for dissection; and it would appear that in some in-



BURNING OF JEANNE D'ARC.
(From painting by Lenepesen).

stances the mangled corpse was made a kind of public show. Such an exhibition took place on the execution of Earl Ferrers in 1760. The body having been conveyed from Tyburn, in his lordship's landau, drawn by six horses, to Surgeon's Hall, was, after being disembowelled and laid open in the neck and breast, exposed to view in a first-

floor room. An engraving made of the scene had a very large sale.

The customs of the different nations vary as to the mode of appointing an executioner. The work is distasteful to most men, but still there has never been a time when the law miscarried through want of an executioner.

When Charles II was beheaded, two men appeared on the scaffold, both closely masked, to prevent recognition, and it was generally reported that both men had volunteered for the work. Until 1861 there was an official with the title "Headsman of the Tower," but for more than a century the office had been a sinecure, as his duty was confined to the Tower, and only those who were condemned to die in the old fortress fell beneath his stroke. The last executions in the Tower were in 1746, when three Scotch lords, Balmerino, Lovat, and Kilmarnock were beheaded for favoring the pretensions of Prince Charles Edward, grandson of James II.

Like many state offices, that of executioner seems to have been hereditary in England. Shakespeare speaks of "hereditary hangmen" (*Coriolanus*, act ii, sc. 1). The London executioner of the time of James I was named Gregory Brandon, and the name Gregory was used as the familiar designation of the executioner for many years. Brandon claimed that his office was one of great merit and he applied to the college of heralds for a coat-armorial, and successfully demanded that he be designated "esquire" by virtue of his office. There is now no official executioner in England. The city prison of Newgate retains a man to inflict the extreme penalty, paying him a small wage as a retainer and giving him a stipulated sum for each execution. The sheriffs of other counties generally hire him whenever an execution is ordered within their jurisdiction.

In 1682 the hangman was named John or Jack Ketch and, to the present time, the

name of Jack Ketch has been used in England as the designation of the holder of the office. The English hangmen of the last two centuries have not been noted for their fine feelings or culture, in fact there are many instances on record of hangmen becoming murderers, and suffering themselves the penalty which they had so often been the agents of administering.

In France the office of executioner was hereditary for several centuries. In 1685 a young man of aristocratic family fell in love with and married the daughter of the executioner. His family discarded him and the king confiscated much of his landed property and ordered that he should become executioner on the death of his father-in-law. The Sansons held the office for seven generations, and, strange to say, they were all men of very refined natures and of high intellectual ability. When in 1847 Henry Sanson was relieved from his position by the government, his mother threw herself in his arms and exclaimed: "Blessed be this day, my son! It frees you from the inheritance of your fathers." Henry Sanson wrote the memoirs of his family a few years later under the title of "Seven generations of Executioners." The French executioner is designated officially and popularly as *Monsieur de Paris*. He receives a salary of four-thousand francs and an additional sum of nine-thousand francs for expenses, besides many perquisites.

There are no official executioners in the United States, unless the State electrician of New York can be so designated. The sentence is carried into effect by the sheriff or by some one engaged by him, generally some official of the prison.

Voltaire was the father of the epigram, "The worst use to which you can put a man is to hang him," and it is a great and debatable question whether civilization will much longer tolerate the putting to death of any criminals. We have limited the number of crimes for which the penalty is ex-

acted, we have diminished the number of modes of legal killing, we have tried to humanize the punishment, if such a thing be possible, we have forever got rid of the tor-

tures of olden times, and we may outgrow the hanging, electrocuting, garroting and guillotining of the present.

THE LAW OF THE LAND.

XII.

WHEN A MAN MARRIES.

By WILLIAM ARCH. McCLEAN.

IT has been said of old,
Needles and pins, needles and pins,
When a man marries, his trouble begins.

The question asks itself, what under the sun have needles and pins to do with trouble after marriage, as far as man is concerned? Contrast the before and after, the time when he had always pinned on a button where he should have sewed one on, and where he could have deftly made use of a few dozen pins if he had had a woman's intuition in the use of them, he had awkwardly labored with the needle. Then later, the time when he gladly gave way to the skill of some one else to do the pinning and sewing. His troubles in this direction ought, to be at an end, instead of beginning, and there ought to be as much salvation in this before and after, as in the various other panaceas, for instance, for baldness.

Of course a knowledge of the true use of needles and pins may mean a new kind of trouble, beginning with the paying of bills for all the kinds of uses they may be put to. If this is what the old saw means, the putting aside of old habits and the learning of new ones with such pointed subjects may possibly mean the developing of a new species of trouble.

It makes no odds how many wives a man may have, as far as needles and pins are concerned, man never grows familiar enough

with them in the make-up of his wife so as not to be scratched by every chance acquaintance on his part. Of course this is trouble enough of its own kind, yet, in spite of this fact, we have to learn of the case where man's awkwardness, and ignorance of his wife's make-up of pins and needles, have ever led to trouble from a legal point of view. A divorce for making life burdensome from such a cause is a thing of the future.

Needles and pins may be only for rhythm, so that it may be said that there are many reasons for trouble in the matter of marriage beside these household necessities. It may be the marriage was on the wrong day of the week, Friday, or in the wrong month of the year, May. Or it may be married in red, you'd better be dead. Or Miss Long may have married Mr. Liver, and hence it must mean that change the name and not the letter, change for worse and not for better. It must be confessed that a certain amount of trouble usually gives an artistic and romantic flavor to courtship and marriage, which might be dull and tasteless if from start to finish it was one hot, blazing, blistering, sunshiny picnic.

There is no excuse for trouble when it comes to marriage unless it is manufactured by disinterested third persons out of a spirit of loving-kindness, and it is a poor

affair that cannot furnish one or more of these third persons, possessed of a philanthropy of helping other people to attend to their business.

There are those who must see in marriage the proof of all the old saws; if these are wanting, something must be wrong. It is necessarily shocking to all preconceptions of trouble and true love if the two did not go hand in hand, for the course of true love never ran smooth. Hence *a priori* and *a fortiori* too much happiness would be a reflection upon itself, and trouble can only be the means of discovering and appreciating one's own true love.

If there were only two people in the world, there might be trouble. Seeking it is a human failing. One or the other has heard of the silver lining and is incredulous, or it sounds dollarish, so a little cloud must be manufactured in order that the silver lining may be mined.

Trouble is a peculiar old dog when it comes to marriage, and slights no one who has had a hand in stirring him up and dragging him out of his kennel. He will run the whole flock to cover. The disinterested third persons are as apt to be in at the finish as the parties themselves. Law helps trouble sort his game out, as plaintiff, defendant, libellant, respondent, co-respondent, witnesses, etc.

The one trouble, overshadowing all others, is the universal, uncontrollable predilection of the human race for marriage. A madness in the blood running toward marriage.

There seems to be a time when thoughts turn to marriage, and marriage, and only marriage, for no other reason than for sweet marriage's sake. It is not a question of the fitness of the subjects for marriage, or the true purpose of marriage, that controls, but it is this getting married so as to be married, that makes humanity pause in its lucid intervals to consider how marriage-mad humanity is.

This phase of the subject was well illustrated recently upon the Pacific slope. The man was twenty-one years old and the woman a girl of sixteen, poor young things, marriage mad. They boarded a fishing and pleasure schooner, and went to a point on the high seas about nine miles from the nearest point of any land belonging to the United States. They were not within the three-mile limit of any other king or potentate. At such point they were married by the sea-captain, the minor not having the consent of either father, mother or guardian. They returned to land and lived together for the space of a week and a day, in the same port from which they had gone on their little cruise, when the lucid interval made its appearance. It was of such lucidity and duration that the courts had to be resorted to, to determine where the parties were at. Their State code required that marriage must be licensed, solemnized, authenticated and recorded, the forms of the same being prescribed. The diagnosis of the situation by the court was that the parties went upon the high seas to be married with the avowed purpose of evading the law relating to marriage. The rule that all marriages without the State, which would be valid by the laws of the country in which the same were contracted, are valid in their State, did not hold, for the parties did not go to another State or country. They went upon the high seas, where no written law existed by which marriage could be solemnized. The parties went where there was no law authorizing the marriage, and went with the intention of immediately returning to their domicile to enjoy the fruits of their contract, one which they could not have made at their domicile. There is no ground of expediency, sound policy or good morals upon which the transaction can be given legal sanction. The marriage could only be upheld on the ground of mutual consent, solemnized by a sea-captain, and cohabitation for eight days; but such a marriage being

contrary to the code could not be upheld. So the parties had all their fun and madness with a lawsuit in the bargain for nothing, which makes rather a good story for the sea-captain to tell to the marines.

Let some supposes be supposed, for circumstances alter cases and may make all the difference in the world as to the ability of a sea-captain to run a Gretna Green on the high seas. Suppose, instead of beating his way back to the port from which he had started, the captain, after the ceremony, had given the couple a wedding tour, by taking them to another State recognizing common-law marriages, marriages which mutual consent and cohabitation make just as good as any according to a code. Suppose after the tour of a week and a day the parties returned home, what then? Surely the common-law marriage life in the port into which they had gone would be recognized in the port from which they had sailed. There might be present the intention to evade the law of the domicile, but their act would also show an intention to reach a shore where the high-sea marriage would be recognized as a common-law marriage, and there be ratified by cohabitation for a week and a day. A ratification in a State recognizing common-law marriages would certainly be such a marriage as the courts of the first domicile would uphold.

Suppose the sea-captain of a tramp schooner fall in love with a passenger and be married on the high seas by his cook, and the couple, mutually consenting, cohabited for a year and a day while they roved the ocean blue, from port to port, where would the couple be at when they finally came to a shore where all marriages must be according to a code? There would be proof of cohabitation, in that year and a day, within the three-mile limit of the shores of many a king and potentate recognizing common-law marriages, and there was no intention to evade any code, what then? Surely it would be more than an idiosyncrasy of a sea-

captain, who are supposed to do odd and unusual things. Surely no court would hold there was no ground of expediency, sound policy or good morals upon which the transaction could be given legal sanction. Surely the ratification by cohabitation within the three-mile limit of shores recognizing common-law marriages would be recognized and upheld, for if otherwise, surely such marriages would be scandalous in the eyes of all sea-cooks.

Suppose the marriage ceremony performed by the sea-captain should have been on the high seas, on an ocean greyhound flying the flag of some country recognizing common-law marriages. Suppose while at anchor in the port of some country, other than the one from which he had sailed, or the one the ship flew the flag of, the newly-married couple disembarked, for permanent purposes, to discover that all marriages in such foreign land must be according to a code, where would the parties be at? What then? Would the affair be a common-law marriage, to be legally upheld because taking place on a bottom under the jurisdiction of a maritime power, where on dry land such marriages are good? Or would the affair be all wrong because the couple never reached shores or three-mile limits, native or foreign, where common-law marriages are recognized? This is a riddle? Give it up? So do we, not caring to detract from the credit due the court solving the question by giving the answer in advance.

All this mad marrying means so much trouble and business for lawyers and courts. The law makes no allowance for the madness. The follies of humanity in the matter of marriage become a stock in trade to the legal profession. The one consolation remaining to the victims is that the lawyers must live like the rest of humanity.

Any disordered mind ought to be able to appreciate the common-sense of the law that holds that persons about to marry occupy a position requiring the greatest good faith.

Marriage is considered not only a valuable consideration, but is the highest consideration recognized by the law, for it is the foundation of the family and of society, for whose benefit all laws have been created.

Notwithstanding this is common-sense of almost commonplaceness, poor marriage-mad humanity, instead of trying to get full value for the consideration, more frequently looks upon marriage as a lottery, in which as little as possible is to be given for the run of the cards or the throw of the dice, in the hope of winning either a jack-pot or a grand prize. As a lottery, of course, every conceivable scheme to beat the game is resorted to, so the players stack the cards and load the dice, but when courts become banker and pay the score, the prizes are generally decrees that those who would enjoy the mad dance of marriage must pay the fiddler to the full extent of his or her ability.

In other words, marriage being a valuable consideration, husband and wife are regarded as purchasers, for a valuable consideration, — marriage — of all property which accrues to either by virtue of their marital rights, and either must deliver what has been paid for.

This contract does not mean a part or a fraction of the marital rights. It does not contemplate an insolvency and a payment of a nineteen-cent dividend on the dollar. It means full payment to the last jot or tittle, unless there was an anti-nuptial agreement. In such cases payment is as nominated in the anti-nuptial bond, while the post-nuptial life is just whatever one can make out of it.

One of the games most frequently put up against a second marriage is illustrated by a case where at the time of marriage the husband was in actual possession of lands, and was occupying the same as a homestead and represented to the intended wife as an inducement to marry him that he was the owner of all the land, and that if she would marry him, and survived him as his widow, she would have and receive her rights in such lands. A

short time prior to the marriage, deeds for the lands are executed to children and grandchildren of a former marriage, the execution of the deeds being concealed from the intended wife, and the deeds being withheld from the public records until after the marriage. This was held to be a breach of the good faith that the husband is legally expected to give his intended wife, and that a secret voluntary conveyance by a man of his lands on the eve of his marriage, operates as a fraud upon his wife and cannot serve to defeat her upon his death of her dower and interests in such lands, allowed to her under the law as his widow. Therefore she may successfully assert her rights thereto as though such conveyance had not been made.

Again, where the wife executed a similar deed on the eve of marriage, the court set aside the deed, saying such secret dispositions, if allowed, would be injurious and likely to create conjugal unhappiness. That where either party desired to provide for former children, a reasonable provision is that of which the intended husband or wife will approve, and that it is, in every case, in the power of the intended wife or husband to communicate her or his intention to provide for former children to the other, and if she or he should refuse to consent, to stay single.

There was an element in the case first mentioned which made it particularly aggravating, namely, the husband's representation that he was the owner of lands which he proposed to alienate before marriage. Such representations, however, are not essential to void a conveyance made on eve of marriage. That which destroys the effect of the conveyance as against the intended wife or husband, is that it is made on the eve of marriage without the knowledge of the intended wife or husband, and hence becomes a fraud on the marital rights. It makes no difference whether or not it is a reasonable provision for former children, if it is kept secret from the intended husband or wife, it is fraudulent and void as against the rights of the deceived

one. There is only one safe rule in such emergencies, and that is one prescribed by good faith, that any such conveyance be made with the full knowledge of the intended one.

Now as the human race is affected with the madness for marrying almost as long as the breath stays in the body, the question suggests itself, is there a time he or she can secretly give away their real estate without it being a fraud on the marital rights of the latest object of the madness? Yes, there is such a time. One may be courting or courted and may secretly or openly give away as much of their lands as they desire, but when the time has come that the one who courts proposes, and the one who is courted accepts, there is the marriage engagement, and from that time begins the contract to purchase for the valuable consideration—marriage—all real property which accrues by virtue of the marital rights. Hence it has been held where a deed is made after the marriage engagement and before marriage, privately and unknown to the intended one, it is impossible that the deed should stand.

Nor is it possible for either to say what the marriage portion of the other shall be without the knowledge of the intended one, for the purchase by marriage is a purchase of all the property which accrues by virtue of the marital rights. Where a husband executed a deed several days before marriage, and requested the transaction to be kept secret, assigning as a reason for such request, that he was about getting married and he thought it was his duty to provide for his own children, that the children of the woman he was going to marry had an estate they were getting something from, and that he would have one hundred acres left which would be a good home for his intended wife if he died, the court set aside the deed as fraudulent as to the wife.

Those who seek to play sharp with the game of marriage, in their madness of marry-

ing, keep bad faith and hence apprehend bad faith on the part of those they may trust. Such often try to deed away their real property on the eve of marriage and still keep it within reach of their grasp. For instance, one executed deeds before marriage, but failed to deliver the same until long after coverture, and of course it had to be held then, that they were not only illegal conveyances at the time of delivery, for want of joint execution on part of wife, but also that even if delivered when executed it would have been fraudulent as to the widow, being executed secretly for the purpose of cutting off her dower.

Many a player trying to beat the game of matrimony is hoisted on his own petard, for while completed conveyances will be void as to the intended wife, however, as between grantor and grantee, they are good.

The tables were nicely turned in this way in a case after marriage, for the many schemes to beat the game continue after marriage as well as prior thereto. Mankind seldom try to make the best of a bargain, but being convinced that they have the bad end of it, will resort to any course that may suggest itself as a way to get square.

Accordingly after marriage and the subsidence of the madness, the husband determined to destroy the marital rights purchased by his wife by marriage. He executed a mortgage to a friend, who, in an unguarded moment, declared that the mortgagor was not indebted to him in any way, that there was no consideration for the mortgage, that the mortgagor had given the mortgage for the sole purpose of preventing his wife from getting any part of the mortgaged premises. Upon proof of such statements the mortgage was held void as to the wife, the person intended to be defrauded, but good as between the husband and his friend; that the husband could not profit by his own wrong and hence was legally bound as far as he was concerned to pay the mortgage for which he had received no value.

In another case the husband conceived the idea that he could defeat the marital rights of his wife by the creation of a trust, so, a short time before his death, in expectation of soon dying, he conveyed all his real and personal estate to his son in trust for said son and other children of a former marriage, without consideration and for the purpose of defrauding his wife's right of dower and share in the estate. Having done so he was fearful he had gone too far and might lose the enjoyment of that which he had conveyed before he was through with it. So at the same time the husband leased the property from the trustee for his life at a nominal rent. The conveyance was however set aside at the instance of the wife.

Still another husband conceived a plan to profit by the mistakes of all the other husbands. He would make no conveyance without consideration, nor give a mortgage without value received. He decided he would borrow money, run into debt and permit himself to be sold out at a judicial sale for the payment of these debts. The perverseness of human nature was well illustrated in this case. Husband and wife were married for a period of forty-six years and had become the father and mother of ten children. After the children were grown differences arose which brought about a separation, continuing for some thirteen years. During the separation several efforts had been made by the husband, and persons desiring to purchase lands of the husband, to have the wife join in a conveyance thereof, which she refused to do, evidently fearing some sinister purpose of the husband. The husband then began his borrowing. The wife came into court alleging that the husband had said to her if she did not join in conveyances of the land he would have his real estate disposed of by the sheriff and that he had borrowed a large sum of money and given a note therefor payable forthwith; that the same day note was given, judgment was entered thereon and execution had issued

on the judgment; that the sheriff had levied on the real estate and was proceeding to sell the same, and that the lender knew of the fraudulent purpose of the husband to defeat the marital rights of the wife in the land. Upon these allegations, the court decided that the question, whether the judgment was collusively and fraudulently confessed, to deprive the wife of her right of dower in the land levied on, should go to a jury, and if the jury found the facts in favor of the wife, the judgment would not be good as against the rights of dower of the wife in the husband's lands, but would be good between the immediate parties thereto.

Now there is a wide distinction between real and personal property when it comes to the marital rights of husband and wife. The trouble we have already spoken of when a man marries pertains wholly to realty. If that portion of the race, mad on the matter of marriage, would own no real estate or would convert all their acres into cash before marriage, then when the trouble would begin to brew it might be possible to beat the game of marriage.

So long as one's possessions are of the nature of realty, an engagement to marry gives either the right to purchase, by marriage, full marital rights in the property of the other. Marriage is the actual purchase thereof, and coverture gives at once to the wife her right of dower in the lands of her husband and to the husband his rights of tenant by the courtesy in the lands of the wife. While these rights only mature by the death of one of the parties to the contract, yet they are in being from time of coverture, and during coverture can only be alienated by the act of the party to whom they belong.

As to personal property the wife and husband have no rights whatever in the same until the husband or wife dies, and at death, and then only, do the rights of either attach to the personalty. As to his personal estate at common law a man is *sui juris* and

being *compos mentis* may give away all his personal property so as to become himself, and leave his wife and children, penniless. A man's wife and children have no legal right to any part of his goods, and no fraud can be predicated of any act of his to deprive them of the succession, or as declared in one case, a husband may dispose of his chattels during coverture without his wife's consent and freed from every post-mortem claim by her.

Such being the law as to personal property in relation to the marital rights of husband and wife, it is not a matter of surprise to find one, a man, who fitted the law to the facts of his circumstances and, in the opinion of the court, to his own everlasting discredit.

It was found as a fact that the husband at least ten years before his death formed the fixed purpose that beyond the use of the house furniture and a comparatively small sum his wife, if she survived him, should receive no part of his estate if he could prevent it, that he would so contrive to prevent her from receiving any part of his estate that he might at the same time continue to have the income and use of the same. His estate consisted entirely of personal property, securities, stocks and bonds. To put his determination into being he executed a deed of trust by which the trustee was empowered during his life to pay over to him and for his use at the time he may receive the same, all the dividends or other income from all the property and securities, and he may deliver the securities in certain designated shares unto the several beneficiaries at such time or times as the trustee in his unfettered discretion shall think fit. The power of revocation of the trust was re-

served, evidently for the purpose that if the trustee should undertake to distribute to beneficiaries during the lifetime of the grantor that he might be forestalled by a revocation of the trust.

The court in refusing to grant any relief to the widow said it was a case of hardship upon her and that the reasons of her counsel upon the barbarity of the law which permits a man to deprive his family upon his decease of a fair allowance for their support were unanswered and unanswerable. It was however the law of the land that the deed of trust passed the entire legal title to the trustee. The grantor parted with the property wholly and entirely. Even the reservation of the income to himself for life was optional with the trustee. The latter could have distributed the *corpus* of the estate to the beneficiaries the next day. The power of revocation reserved having never been exercised was precisely as if it had never existed. It was the creation of a present trust in favor of the beneficiaries. The securities passed into the hands of the trustee with the trust deed. The transaction was complete, and the donor was absolutely denuded of his property and, as a man may do what he pleases with his personal estate during his life, the trust as created must be sustained.

All of this marrying suggests the advice to those about to marry: "Don't," or do with all you have to get out of it all there is in it. If you "don't," there can be no trouble, unless you promised to do before you resolved the don't. It must be a don't from the very beginning of things. If instead it is a do, let it be one in which there will be nothing due from you, then your courting will not end in courts.

PHILOSOPHY OF LAW.

BY R. WAITE JOSLYN, LL.M.

IT is the purpose of this article to discuss the origin and nature of laws; to consider what is good law, and to review the function of statesmen and lawyers.

In discovering the origin of and defining what law is, let us consider the United States inhabited by but three men. They have never seen each other. One lives where San Francisco now is; one at Chicago; one at New York. Each thinks he owns the entire country, for there is none to dispute his sway. Each does whatever he desires. He may do anything no matter how absurd. He is "monarch of all he surveys." He may slay any animal; hew down any forest; build any highway; do anything that his most tyrannical or whimsical fancy may suggest. The ocean, the land, the heavens, he thinks are his. This is free, natural liberty of person and property. There is no restraint or restriction upon them. No opposition to their desires.

Now imagine Chicago to go West to Omaha and San Francisco to come east to Omaha. They meet for the first time. Each says to himself who is this being? What is he doing on my property? I will put him off or make a slave of him. A struggle follows: neither is overcome, but both exhausted. Pride gives place to reason, and since neither can enslave the other, they begin to think there may be some mistake. Each may have right. They begin to argue. Here is the beginning of Reason's rule and the suppression of Dictation. They find that each has rights to respect and that each does not own the entire country, as he had ignorantly concluded. They finally determine upon a compromise. They agree to divide the land, Chicago taking east of Omaha, San Francisco taking land west of Omaha. They agree to restrict

themselves. Chicago says, in order to avoid trouble in future and for the sake of peace, "I will restrain myself from going on your land." And San Francisco does the same. The basis of this agreement is the fact that the force of Chicago is equal to that of San Francisco. If Chicago could suppress San Francisco, he would dictate to San Francisco. That would be a condition similar to monarchical government where the stronger makes the laws because he has the advantage of the weaker, but where each is equally strong then both together make the laws. The restriction then that Chicago and San Francisco agreed to would be a law — it would be the first law.

Law then, made by equals, is two things: 1st, An agreement, 2d, A restriction upon natural liberty.

So a law is nothing more than an agreement between two or more persons to restrict their actions in some direction.

So in a nation such as the United States where all citizens are equals, a law must be no more than an agreement between the different citizens of the nation, to restrict their actions in certain directions in order that peace may prevail in society.

Imagine sometime after the struggle between Chicago and San Francisco that Chicago met New York. A struggle followed, neither overcoming the other. So Chicago said, "Let us go to Omaha and submit this question to San Francisco." The result was that the three men agree as follows: —

"We declare that neither of us shall go upon the lands of the other nor in any way interfere with the person of each other. If one of us breaks this agreement or law then the other two shall compel him to observe it, for we make it in order to have peace among us. This was the rule of the major-

ity. This was the first Constitution. It was another restriction upon the natural right of these men to do as they desired.

But after many years we may imagine a race grew up on each of these three pieces of land. After a time the San Francisco race, thinking they were stronger than the Chicago race, made war upon Chicago to take their land, but the New York race stepped in and said, "No, we agreed to restrict ourselves and not go upon the lands of the others, so San Francisco shall not impose on Chicago's rights because San Francisco is the stronger." New York and Chicago join and put down San Francisco, thus compelling him to keep the agreement and preserve peace. Order is thus restored. This is the majority enforcing the original agreement.

Then the different races select representatives who meet at Chicago, and agree to a great many restrictions, which the people of the different races thus impose upon themselves and agree to follow. Each restriction or as we call it, law, says, "You must not do so and so." Each law is a restriction upon natural liberty, and the reason for the restriction is that it is necessary in order to create harmony among all the people in the nation. Men say if we each claim a right to do everything and act as though we only lived in the world, we will always be quarreling, so in order that we may enjoy each other's company and the benefits of being together, we will all agree to restrict ourselves and not do certain things, and we each further agree that if any of us break this agreement we will compel him to keep the agreement, for it is for the good of all, and we all agree to it, hence have no right to break it.

Thus law in a republic, which is the only right law, must be a restriction upon natural liberty for the best good of all who belong to the society — a self-imposed restriction. These restrictions upon natural liberty have at different periods and in different nations been variously made and enforced.

First, by a system in which one man made the restrictions for all the people, as in patriarchal and monarchical government. In such instances one man was made king, emperor, or was known by other title. He represented enough of the people to give him the balance of power, so he made any restrictions he desired, whether just or unjust, and usually his restrictions were made for the benefit of the class who ruled.

The restriction was an agreement between a few of the citizens rather than all who were affected by the restriction or law. These few passed such laws or restrictions as their interests dictated, and generally such restrictions were unjust and oppressive to those citizens who had no voice in making the restrictions.

This was unjust law, because it deprived men of control over their property and without their consent. It was an imposition upon natural liberty. These restrictions were imposed upon the weaker by the stronger in physical power.

At other times and places these restrictions have been imposed by appealing to the superstition of the people. Certain men claimed, as in theocratic government, to receive messages from a divine source directing what restrictions were best for the people in order to preserve harmony. The people believing these men divinely directed, accepted the restrictions they outlined. But too often the restrictions were made by unscrupulous men who formed them in their own interest rather than for the good of all the people who followed them. They were unjust restrictions because not for the benefit of all classes and have therefore often caused discord. The object of all restriction is, as we saw, to create harmony among the people who associate together as a nation or society. Under monarchical government the people were kept in peace by force, and by the superstition that the restrictions or laws made by a king could not be unjust. But these restrictions, although they created a

temporary harmony and were perhaps the best that could be had in the then condition of the world, were not good law because they were not agreements between all the people. They were too often made in the interests of a few, hence were unjust. They were not restrictions imposed upon all the people by the mutual agreement of all the people. So, as a natural consequence, as the people came to understand government and to appreciate that these restrictions were one-sided and unjust, they demanded that restrictions should not be made by one class, but should be made by the agreement of all who were to be affected by the restrictions. They concluded that restrictions were good law only when made in the interest of all the people, so they established a new system, such as we have in America, where laws are made by the agreement of all citizens, through their representatives. By our system every citizen agrees to the laws or restrictions passed by the representative body. He agrees that he will abide by the decision of the majority, believing that such decision will be in the interest of all the people. Every naturalized citizen must agree to the original constitution and existing laws. Every citizen has a voice in making restrictions, hence they ought to be good laws and not one-sided, if the people are not negligent. Hence we may conclude that the representative form of government is the only form by means of which just laws or restrictions may be imposed upon those who agree to follow such restrictions in order to have harmony in the state.

We desire to draw from this that all right law is an agreement between all citizens to adhere to certain restrictions upon their natural liberty in order that peace may prevail and civilization be made possible, and not that law is "rule of action imposed by a superior power upon an inferior power." We assert that this is a definition of unjust law as it existed under monarchical government, and that right law is not imposed by

a superior but rather by the agreement of equals. It is simply a contract between the members of a society or the citizens of a nation, which contract each agrees to abide by and sustain—there is here no dictation of a superior to an inferior. It is in the first instance an agreement, and any law or restriction which is other than an agreement between all citizens for the good of the nation is not good law as we understand it at the present day.

Law, then, we define as a rule of action imposed by the mutual agreement of the governed. This view is substantiated by the first clause of all laws enacted in the United States. The United States Congress enacts laws by beginning: "Be it enacted by the *people* of the United States in Congress assembled."

The States enact laws beginning, "Be it enacted by the *people* of the State of—— represented in the General Assembly."

The city enacts laws beginning, "Be it ordained by the City Council of the city of——."

The Constitution of the United States in its preamble reads, that "We, the *people*, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Thus the enactment of every law in the United States bears upon its face the evidence that it is an agreement between those upon whom it is imposed and not a restriction imposed by a superior upon an inferior.

Let us now briefly consider the fact that every law is a restriction upon the natural liberty. The restriction may be imposed in one of two ways.

1st, By stating "Thou shalt not do so," or direct restriction.

2d, By stating "Thou shalt do so," by which is meant "do not act in some other way."

For instance, law declares that every citizen shall pay his just taxes, by which is meant that he shall not fail to pay his taxes. It is a restriction upon his right to dispose of his property. It states, "This amount of thy property thou shalt not dispose of, it belongs to the state." So every law is restrictive or directive, which are at basis the same thing, namely, — a restriction upon natural liberty, since they both, in fact, indicate what shall not be done. Meaning by "respect the private property of others," do not disrespect such property. Every law is a restriction upon natural individual action.

Take the law which commands that no man shall commit murder. Wherein is this a restriction upon natural liberty? In primeval times every man could kill any other man if he was the stronger, and no questions were asked, but, as society progressed, it was found this incessant warfare and bloodshed endangered society and was against the harmonious conduct of a state, so that restriction was made that no man should kill any other man. It was a restriction upon the liberty men have when not gathered together in a nation.

Take the law which declares that no man shall imprison another man without due process of law. This is a restriction upon the natural right of the strong to enslave and overcome the weak. Society restricts this natural right of strength in order that every man may feel secure in his person.

Take the law that says "Thou shalt not steal." Before men gathered together in nations any man could take and keep any property he could accumulate by force. He could take any man's property if he was the stronger. This sort of thing was justified on the ground that might was right. But nations desiring peace made this restriction — that no man should take property from any other man without his consent. Thus the laws of robbery, burglary, larceny, etc., are restrictions upon the natural liberty of every man to take and keep whatever he

can get by force. All these restrictions are made for the good of all the people in a nation.

The law of marriage is a similar restriction upon the natural liberty of men and women to live together. Law put a restriction upon this liberty by declaring under what conditions marriage shall be entered into. It is a restriction agreed to by all citizens for the good of the nation.

There is in every State a law prohibiting assault and battery. In a state of natural liberty men could assault one another whenever they met, and as a consequence perpetual warfare existed, so nations declared against this natural liberty to engage in combat and restricted this natural right by declaring that it should not be done because it disturbed the peace of the nation, or some part of it. It did not tend to create harmony, hence it was restricted, for harmony is the end sought by nations. The peace of all was superior to the natural liberty of each. It was a condition of the original agreement between the members of a nation that, in order to realize the benefit of society they would agree to forego such of their natural liberties as were found detrimental to the peace of the nation. Thus these laws are nothing more than restrictions upon man's natural liberty, such restriction being made by mutual consent, in order that a large number of people may live together harmoniously.

Enactments are made indicating what natural liberties are not restricted, but these are laws only as far as they inferentially declare that these natural rights shall *not* be interfered with. They are indirectly restrictions. So all true law is restrictive of the natural rights of individuals. These laws or restrictions in every nation are numbered by thousands and they relate to every branch of life. Wherever men come together, some law, statutory or customary, indicates what each should not do. If the law does not prohibit a given act, directly or by inference,

it may be done. But the general inference of all society is, that any act which in its nature is against the harmony and progress of the society, is restricted, if not directly, then inferentially. The aim of every restriction upon natural liberty is, as stated, to create and maintain peace to the members of the society, to the end that all citizens may know wherein they are deprived of their natural liberty for the good of the society. Statutes and codes are passed, and customs which have long existed have been placed together in certain books, which are acknowledged to contain the restrictions which shall be maintained. Not that the principles in books are forever good law, but they are supposed to be the restrictions to be followed in that society, in order that such society may live in peace. Every nation, as stated, has its statute laws, by which is meant laws indicating wherein the citizens of the nation or state shall restrict themselves. Every city enacts ordinances which embody the restrictions imposed upon the citizens.

In the United States there is first the Constitution, which indicates certain fundamental acts which shall be restricted.

Freedom of speech shall not be suppressed; i. e., No man shall suppress freedom of speech; No man shall suppress freedom of press; No man shall suppress freedom of petition; No man shall suppress freedom of religion; No man shall disturb freedom of person; No man shall disturb freedom of property; No man shall imprison another; No man shall be placed in slavery; No man shall be denied the right to vote.

These are some of the fundamental restrictions imposed by the agreement of the people as indicated in the Constitution, which is the article of agreement between the people of the nation.

The national Constitution further establishes a system of government. This is a restriction upon the natural liberty of every

man to govern himself as he may desire, for the Constitution inferentially declares, "Thou shalt not carry on government in any other way." This law is on its face merely directive, but at bottom it is purely restrictive, since it restricts government to the system outlined in the Constitution. The National Constitution does not go into details of restriction, this is left to the State governments, which pass such laws as are necessary to restrict men in all their relations. The individual States restrict the actions of citizens in every detail of their life. The city government restricts the liberties of those within its borders so far as necessary for the harmony and prosperity of the city and no further. State law is an agreement between citizens of the State; city law an agreement between citizens of the individual cities.

In addition to these express statutes of nation, state and city there are certain restrictions called common law. They compose such restrictions as have become law by custom, because they have been found by long usage to further the peace and prosperity of the nation.

Thus all these so-called laws are nothing more than restrictions upon the natural liberties of men to do as they desire when not associated in a nation, and this leads to the question "What is good law?" And following that, How can bad law be tested and discovered? From what has been stated, we may assert that good law is such a restriction upon the natural liberty of the members of a society or nation as is necessary to create and perpetuate harmony in the conduct of such society or nation, or such a restriction as is expedient in order to increase the prosperity of the society or nation. Good laws may then do one of two things:

1st. Restrict acts which would mar the peace of the individuals of a nation.

2nd. Restrict action for the purpose of improving and advancing the condition of

the individuals in a nation. The one characteristic common to all good law, of whatever kind, must be that it tends to benefit and advance the interests of all upon whom the law or restriction is imposed, for no class of men would agree to a restriction detrimental to their interests. So good law is a restriction for mutual benefit. This is the test of a law: Does it in its effects tend to benefit the society or nation as a whole?

Laws or restrictions may be thus beneficial in two ways.

1st, Directly.

2nd, Indirectly.

A restriction directly beneficial to all the citizens of a nation is illustrated by the law that says, "No man shall fail to pay his just debts." Which in other words is, "Thou shalt not sell or give away your property until you have paid your fair debts." It is a restriction upon the natural liberty of all men to sell or give away their property. It is necessary in order to protect men who trust and give credit to other men. It is also expedient, for it facilitates commerce by increasing buying and selling, thus promoting prosperity. This restriction is directly beneficial to all men, for it gives them an immediate opportunity to secure their debts and prevents debtors from defrauding creditors.

The law of taxation is an indirect benefit to the citizens of a nation. The direct effort is to take a portion of a citizen's property, but this property is used to sustain the government of the nation and thus makes it possible for men to live together and enjoy the benefits of society. Taxation is the basis of the state, without it the nation could not exist. It is, therefore, necessary, expedient and just, if properly and equally distributed upon all citizens. Taxation is indirectly beneficial to the citizens of a nation, in the same way that the foundation of a building is necessary for the superstructure. People use the building but not the foundation, but the

foundation sustains and makes possible the superstructure. Hence taxation laws must be just restrictions upon the right of men to dispose of their property as they desire. Taxation, then, is the fundamental and hence greatest benefit to citizens of a nation if properly applied, but if improperly distributed it becomes injustice and thus a good law may lead to injustice by abuse. The only question in determining good law, then, is not, Is it good law in theory? but also Is it good law in fact? Is it a good restriction justly applied? Is it in its nature necessary, and is it, in its working, beneficial alike to all citizens and not merely to a few or a class.

Thus, then, a restriction or law may be good in theory but poor in practice. To be good law it must be good both in theory and application, by which is meant it must be applied according to its principle, and not be perverted. So, then, if any statute, equity or common law, is not in its effects when properly applied, beneficial to the society or nation as a whole, it is bad law. Bad law is any restriction imposed, but unnecessary to preserve harmony, or tending to create discord, or not expedient to promote prosperity. The law that allowed England before 1776 to tax the colonies without their consent was bad law.

1st, Because it was a restriction upon man's natural right to sell or give away his property, and was imposed without the man's consent. Good law is an agreement for mutual good. This law was no agreement, but rather an imposition by force. Dictation of the stronger upon the weaker. It would be bad law because it lacked the essential consent or mutual agreement in the first instance; and second, it was unjust because more tax-money was collected than was necessary to create harmony, and such tax-money was not applied for the benefit of all citizens both in England and the colonies. It was of greatest benefit to a

class, but it was primarily bad because it was a restriction imposed without mutual consent of the governed as all good law should be.

The law that allowed one man to make a slave of a fellowman was an unjust law because, —

1st, It was a restriction imposed by force of the stronger and not by the mutual agreement of all governed. It was against consent.

2nd, It was not necessary to create harmony, but rather created discord.

3rd, It was not expedient to prosperity, but rather tended to degenerate society.

Any law that is not necessary for the peace of society or expedient to its advancement is an unjust restriction upon man's natural liberty.

Thus any law which tends to advance men or their opportunities for progress and harmony is good law. Any law that tends to oppose this is bad law.

In this discussion we have sought to define law as a restriction upon the natural liberty of men. We indicated certain restrictions, imposed by the stronger upon the weaker, but showed that these could not be true laws, for law should be an agreement between all who are governed by the law or restriction, for the purpose of securing peace and the benefits of society.

We outlined the American laws as a system of restrictions upon the citizens of the United States imposed by their agreement, through representatives. Common law we found to be based on inferential agreement. We sought to discover what was good law and also what composed bad law, and mentioned the test by which all laws or restrictions could be weighed and their justice or injustice discovered.

We will now briefly consider the functions of statesmen and of lawyers.

Statesmen make the laws for the people who choose them as representatives. They are agents acting for a principal. The duty

of statesmen when viewed in accordance with the nature of laws as we have shown it, is to ascertain where in the nation-society discord exists, or is likely to occur, and to enact such restrictions as are necessary to remove or prevent the discord, and establish peace. Their further duty must be to observe the progress of the nation or state and to enact such restrictions as shall be expedient to advance the interests of the nation over which they preside.

In order to justly accomplish this end they should be men who have a thorough knowledge of the nature of nations, so that they may with judgment discover a given evil, present or prospective, and indicate what restriction will cure or prevent it. They should be men with a full and true knowledge of the facts, for without the facts they cannot with discretion indicate a remedy. They should have a complete knowledge of the nation they attempt to regulate by restricting the citizens in certain regards, in order that their restrictions be such as will obviously be for the good of all citizens, for unjust restrictions lead to discord. They should be broad-minded, learned men who may without local prejudice consider the good of the whole nation, state or society for which they make restrictions, and who shall not restrict one class to the detriment of another class. They should, briefly, be able to pass just laws or restrictions.

Such a result must be in part obtained by the representative system, where every section and interest in a state is represented in a common assembly. Every side is heard and if men were fair, the majority vote would indicate that a given restriction was good law and citizens would have confidence in legislative law. But while lobbying exists there cannot be such representation of facts as will give confidence to the restrictions enacted by representative assemblies. But such is the function of statesmen, viz., to discover necessary and

expedient restrictions upon the natural liberty of citizens, and formulate them into laws for the good of all citizens.

But what is the function of a lawyer? We have shown that a law is a restriction and that in a nation there are thousands of such restrictions touching every department of life and directing what citizens should not do, and enacting penalties for breach of such restrictions. Now, a citizen engaged in the business of every day becomes acquainted with but few restrictions. He acquires a knowledge of such restrictions only as are necessary to conduct him peacefully in this particular branch of life. But restrictions are so numerous and in some cases so conflicting at different times that a class of men has arisen who make these restrictions a special study. They spend years acquiring a knowledge of these laws or restrictions and having gained such knowledge, they sell it to other citizens who desire to know how they may act, but who have not had time to gain a knowledge of what they may not do, and how they should act. This is the function of lawyers, viz., to direct citizens as to how they may safely act in order not to disturb the peace of society—to direct citizens as to which of their natural liberties have been taken from them in order that they might enjoy the benefits of society.

Another function of lawyers is to secure

to a man his natural rights when they have been taken, but not by virtue of some restriction or law, necessary or expedient. Lawyers and courts have for their purpose the remedying of breaches of the law, caused by the ignorance of men as to what restrictions have been placed upon their original agreement; or caused by the cupidity of men who refuse to keep this original agreement, and upon whom force must be used to compel obedience to their original contract.

Lawyers are to the laws of society what physicians are to the laws of the human body. They remedy defects in the relations of men, as physicians remedy defects in the relations of the individual parts of the body.

Rightly viewed then, lawyers in following their duty have but to discover the evil that causes discord between individuals in a society, and to prevent or remedy such discord. To this end courts and the police and penal systems have been created.

So, then, we conclude this article by stating that all law is a restriction upon actual liberty, enacted by the agreement of the governed. That statesmen are men who, knowing the needs of a nation, enact just restrictions; and that lawyers, courts and police systems prevent and remedy breaches of these just restrictions in order to perpetuate social harmony.



THE ORIGIN AND HISTORY OF LYNCH LAW.

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THERE is, perhaps, no term in general and common use among the English speaking people, the true origin and significance of which are so little understood as are those of the name lynch law. It is supposed by most persons that it had its origin, as it has its modern application, in deeds of wild lawlessness or ruthless murder; and that the man whose name it commemorates was one whose inclinations, habits and accomplishments well fitted him for the leadership of such a pirate band as could best execute his *law*. Such, however, is not the case. There exists the warrant of statute law—though, indeed, it is *ex post facto*—for the commission of the acts which first found an application for this term; and the man who by it is “damned to everlasting fame” was one of the first gentlemen in an age and community of gentlemen, whose superiors in true courtliness, manhood, and self-sacrificing patriotism, the world has never seen.

It is a remarkable fact that no authentic and exhaustive history of lynch law has ever been published, and it is the purpose of the present article to supply this deficiency. In its preparation the writer has not hesitated to make use of, or even to take passages from, the several articles he has seen on this subject, when found historically correct. In this connection he would particularly mention the valuable sketches which from time to time appeared from the pen of the late Robert W. Carroll, of the Cincinnati (Ohio) bar, a descendant of the Lynch family.

From the days when Cain slew Abel, men have been wont occasionally to take the law into their own hands, and execute summary justice, or injustice, on the objects of their suspicion, enmity or mistrust. No name of general use and application, however, other than that of mob law, was ever coined to

characterize acts of this kind prior to the general acceptance of the term lynch law. In one section of England, some centuries ago, mob law was called “Lydford Law”; but that term never became more than a localism. A Devonshire poet wrote of it:

“I oft have heard of Lydford law,
How in the morn they hang and draw,
And sit in judgment after.”

It was entirely provincial, however, and failed to secure the recognition of contemporary lexicographers. Lynch law, though originally a localism and restricted in its application to a systematic, though summary, mode of trial and punishment when guilt was established, has now become an accepted term of the English language, and the common name by which all acts of lawless violence are usually designated.

None of the earlier English lexicographers, such as Sheridan, Johnson, Richardson, Walker and Boag, give the terms “lynching” or “lynch law,” or any word derived from the same stem; whilst Craig’s Edinburgh edition, 1859, has “to lynch” and characterizes it as an Americanism. Worcester gives “lynch” and “lynch law,” defining them practically as Webster (whose definition is given below) does, but venturing no opinion as to their origin. He merely mentions the fact that these terms find an occasional application in the southeastern portion of the United States.

In the several editions of Webster we see something of the development of these words. In his edition of 1856, he gives as the definition of lynch, “To inflict pain, or punish, without the forms of law, as by a mob, or by unauthorized persons,” marking it as of American origin. At the same time he defines “lynched” as “punished or abused without the forms of law,” and “lynch law” as

"the practice of punishing men for crimes or offenses by private, unauthorized persons, without a legal trial," adding: "The term is said to be derived from a Virginia farmer named Lynch, who thus took the law into his own hands." And in that edition no question is raised as to the accuracy of this account of its origin. In Webster's edition of 1893, however, we find the following: "Lynch: To inflict punishment upon, *especially death*, without the forms of law, as when a mob captures and hangs a suspected person." Also this: "The term lynch law is said to be derived from a Virginian named Lynch, who took the law into his own hands. But the origin of the term is very doubtful."

There are two differences between the definitions of these respective editions which are particularly significant. The one is the decided development of harshness, and the other the express equivocation as to origin, in the later edition. The first edition does not even suggest death in this connection, and, without question, accepts the words as purely American, while the second accounts death as an especial characteristic, and expresses grave doubt as to its origin; without, however, advancing any other theory than that which the work had previously, and for many years endorsed.

The reasons for these changes seem evident. That for the increased harshness of the definitions is that the nature of the punishment inflicted under the same name has become much more severe, as we shall demonstrate; and that for the expression of doubt as to origin, when no strong conflicting claim is set up, is doubtless due to the fact that no one has heretofore taken the trouble to investigate fully, and establish authentically from the records, the American claim.

"Nuttall's Dictionary" (London edition) follows Webster, but falls into the error of calling the Virginia planter John Lynch. Johnson's "Universal Cyclopædia," edition of 1896, also follows Webster, as do the

"Imperial Dictionary" (London, 1893), the "Standard Dictionary" (1895), and the "Encyclopædic Dictionary" (1897), except that the latter takes the responsibility of stating positively that the term is of American origin, and "is naturalized in England."

The "Century Dictionary and Cyclopædia" is the only work of general reference, so far as this investigation goes, which may be considered an authority on this subject. Indeed, the other works appear to be following each other in a circle, pervaded by a common uncertainty, except that some of the English writers aver with certainty that the term is an Americanism. The "Century" defines lynch law as the "kind of law administered by Charles Lynch (1736-96), a Virginia planter." It then briefly touches on the principal features of Lynch's operations, and adverts to the fact that its origin has been sometimes erroneously ascribed to John Lynch, the gentle Quaker, founder of the city of Lynchburg, a brother of Charles Lynch, and to James Fitzstephen Lynch, at one time mayor of Galway, Ireland. Its sketch is brief, but accurate.

The "Encyclopædia Britannica," while expressing the Websterian doubt as to the origin of the term, and submitting the statement of its probable derivation from the Virginia Lynch, intimates that it may be traced back to the act of James Fitzstephen Lynch, mayor of Galway, Ireland, in 1493, "who is said to have hanged his own son out of the window for defrauding and killing strangers, without martial or common law, to show a good example to posterity." A full account of this event may be found in Hardiman's "History of Galway" (Dublin, 1820), at page 70. It is, in substance, as follows: The mayor was on one occasion visited at his home in Galway by the son of a gentleman named Gomez, whose hospitality he had previously enjoyed while on a visit to Spain. His son, Walter Lynch, who was deeply enamoured of and betrothed to a young lady of that vicinity, made his guest

acquainted with his *fiancée*, but soon became harrowed with rage and chagrin at the growing intimacy which sprang up between them. One night, in a fit of jealous passion, he stabbed the Spaniard to the heart and threw his body into the sea. The crime was quickly discovered, and, says the chronicle, "In a few days the trial of Walter Lynch took place; a father was beheld sitting in judgment, like another Lucius Junius Brutus, on his only son; and, like him, too, condemning that son to die as a sacrifice to public justice." Though public sympathy had now turned in favor of the son, and every effort was made, even to popular clamor and tumult, to effect his pardon, the father "undauntedly declared that the law should take its course." The mayor assisted the executioner to lead the culprit toward the place of punishment, but they were impeded by the appearance of a mob, led by members of the mother's family, demanding mercy. Finding that he could not "accomplish the ends of justice at the accustomed place and by the usual hands, he, by a desperate victory over parental feeling, resolved to perform the sacrifice which he had vowed to pay on its altar. Still retaining a hold on his unfortunate son, he mounted with him by a winding stair within the building that led to an arched window overlooking the street, which he saw filled with the populace. Here he secured the end of a rope, which had been previously fixed around the neck of his son, to an iron staple which projected from the wall, and, after taking from him a last embrace, he launched him into eternity." The people, "overawed by the magnanimous act, retired slowly and peaceably to their several dwellings."

The house is said to be yet standing in Lombard Street, which is now known by the name of "Dead Map's Lane." "Over the front door are to be seen a skull and cross-bones, executed in black marble," with the motto, "Remember Deathe; Vanitie of Vanitie, and all is but Vanitie."

It will be readily observed that this just act of the severely honest old Mayor of Galway furnishes no example of, nor precedent for, mob violence, and no reason for bestowing upon it any name, and more particularly his name. He was the acknowledged and legally constituted authority presiding over the tribunal in which his son had had, presumably, a fair, regular, and impartial trial, and had been thereupon condemned to death. He was guilty of no act in derogation of the established laws of the land, but, on the contrary, persisted in executing those laws in the face of popular opposition and tumult, insisting that "the law should take its course." His act was totally without any definition ever attached to the term "lynch law," and was, in fact, directly in the face of that so-called law, and everything tending in its direction. No definition has ever been attached to "lynch law" that does not plainly indicate that its operation is wholly without, and, indeed, in opposition to, the established laws of government. On the face of the proposition, therefore, it would seem evident that the name is not derived from a man whose most noteworthy act was in direct repugnance to its every principle. And, too, had it originated then, it would surely have been heard of during the three succeeding centuries, and not have appeared for the first time, at the expiration of that great period, stamped in both America and England as of American origin. (See "Harper's Magazine" for May, 1859, p. 794.)

Although the term did not become a part of the English language in consequence of the act of the distinguished and fanatically law-abiding Galway mayor, it does owe its genesis, some three centuries later (Howe's "History of Virginia," edition 1845, p. 212), to a scion of the same stock. According to Hardiman, D'Alton, and other historians, the Lynches came to Ireland with the first English invaders over seven hundred years ago. The family is supposed to have orig-

inally come from the city of Lintz, the capital of Upper Austria, from which the name is derived. They claim descent from Charlemagne, the youngest son of the emperor of that name. Sir Hugo de Lynch, a general under William the Conqueror, came to England with that monarch, in whose estimation he stood very high, and from whom he received considerable favors. The first of the name who came to Ireland was Andrew de Lynch, to whom Henry II gave large possessions in the vicinity of Castleknock, near Dublin. His youngest son, John Lynch, who was married to the daughter of William de Mareschall, migrated westward to Galway about the year 1261, "where his line acquired much property, and, until the middle of the seventeenth century, was one of the most influential families."

The manner in which the family received its armorial bearings is quite interesting. One of the Lynches, long before the invasion of England by the Conqueror, was governor of Lintz, and defended the city with unexampled ardor and fortitude against a very powerful enemy. From the uncommon length of the siege, his provisions became exhausted, and the garrison was reduced to the miserable necessity "of subsisting on the common herbage of the fields." Notwithstanding this extremity, he was finally victorious, and his prince, amongst other recognitions of his valor, presented him with a trefoil on a field of azure for his arms, and a lynx, the sharpest sighted of all animals, for his crest, — the former in allusion to the extremity to which he had been reduced for subsistence during the siege, and the latter to his foresight and vigilance. As a further testimony of his fidelity, he also received the motto, "*Semper fidelis*," which arms, crest, and motto are borne by the family in both Virginia and the "Old Country" to this day.

Pierce Lynch was the first mayor of Galway in 1484, and during the next two hundred years no less than eighty-four mayors

were Lynches. (See Hardiman's "History of Galway," p. 18.) Shield, in his "Sketches of the Irish Bar," makes honorable mention of one of the Lynches, who was a member of that bar. Of this ancient stock was the Count Lynch, mayor of Bordeaux, who so "eminently distinguished himself in the cause of the royal family of France against Bonaparte," and also Charles Lynch, the progenitor of the Virginia Lynches.

The latter left his home in the north of Ireland while still a boy, and came to the colony of Virginia in the early part of the last century. He is said to have left Ireland in consequence of a punishment (presumably a flogging) received at school. The high spirit of the youth appears to have revolted at this indignity offered him by the schoolmaster, and, shortly afterward, meeting with the captain of a vessel which was just starting on a transatlantic trip, he embarked, doubtless thinking of how he would thus punish his family for letting his school grievances go unheeded and unredressed. It was the old story, however. As he thought of the consternation his absence would create, and of the scenes of sorrow to be enacted around the old home fireside, his heart warmed to the scenes and friends of his early childhood he was leaving, perhaps never to see again, and he was consumed with regret. So great was his desire to return, that, while the ship was yet not a great way from shore, he actually sprang into the sea and endeavored to swim back. He was picked up, however, and, as if by fate, borne on to "the land of the setting sun." ("Sketches and Recollections of Lynchburg," p. 10.)

Upon the arrival of the vessel in the colony of Virginia, the captain, in accordance with the custom of the day regarding indigent persons, put up young Lynch, to sell at auction to the highest bidder his services for a sufficient time to raise the amount of his passage money. Christopher Clark, a wealthy and influential planter, attracted

and sympathetically moved by the bright appearance of the youth and the story of his adventure, became the purchaser, and carried him home. He was treated as a son, and grew up to manhood under this kindly care and guidance, developing ability and unusual energy. He loved and subsequently married Sarah, the charming daughter of his friend and benefactor. They took up as a homestead a large tract of land on the banks of the James river, near the mountains, and in sight of the lofty and beautiful twin peaks of Otter. Upon a part of this tract now stands the city of Lynchburg. This land was at that time in Albemarle County, but was subsequently, Jan. 1, 1755, incorporated as a part of Bedford, and on Feb. 1, 1782, became a part of the county of Campbell.

Mr. Lynch was a justice of the first county court held for Albemarle County. It convened on January 24, 1744. At the June court, 1745, he produced a "commission from the governor, as captain, and took the usual oath." He afterwards came to be known as Major Lynch, but the writer has seen no record of his promotion to that office. In 1748, he represented his county in the House of Burgesses (Burk's "History of Virginia," vol. III, p. 133), and, in 1749, he became high sheriff, then an office of considerable honor and emolument, which position he acceptably filled until 1751. He died in 1753, a wealthy and highly respected citizen. In the division of his estate, his lands on the James River, including the present site of the city of Lynchburg, passed to his son John, and his extensive possessions on the Staunton became the property of his other son, Charles Lynch.

From about the year 1725, to the time of the Revolution, Quakerism made considerable progress throughout Virginia. Among the converts were the family of Major Lynch, and the first Quaker "meeting-house" ever established in that section was located on the lands of his widow, in pursuance of au-

thority granted by the Sugar-loaf Mountain meeting on October 12, 1745. The ruins of the stone meeting-house subsequently erected by this congregation, together with its rock-walled, time-worn graveyard, still present a most picturesque object in the landscape some four miles south of the city of Lynchburg. A flat stone, formerly immediately over the doorway, bears the date of its erection.

The younger Charles Lynch, son of Major Lynch, the emigrant, was born in 1736. He married before he was nineteen years of age, and following his mother's example, was a consistent Quaker. For years he was a very active and energetic member of the Society of Friends, and most of that time was "Clerk of the monthly meetings." It seems, however, that later the Irish blood of his ancestry, under the stimulus of the exciting times, coursed too rapidly through his veins for the gentle, peace-loving Quakers, and they considered that he had become "unsatisfactory"; and the minutes of the meeting show that in 1767 he was "disowned for taking solemn oaths, contrary to the order and discipline of Friends."

Though his Quaker brethren were of opinion that he had declined spiritually, it is evident that he had suffered no loss of the social and political prestige to which his ability easily entitled him. He was an ardent Whig, and in 1769 we find him, as his father had been before him, a member of the Virginia House of Burgesses. And when, in consequence of resolutions passed by that body to the effect that the taxation of the Colony should be in the hands of the Burgesses, and that all trials for treason should take place in the Colony, the House was dissolved by Lord Botetourt, the governor, we find his name as one of the signers of the Non-Importation Agreement, which the Burgesses prepared and promulgated from a private house, and which gave the British government so much concern. (See Burk's "History of Virginia," vol. III, pp. 345-349.)

He was also a member of the House of Burgesses in 1774-75. When out of public service, he led the life of a rich and respected Virginia planter, surrounded by his family and slaves. His home was some twenty miles above Red Hill and Roanoke, the afterward famous homes, respectively, of Patrick Henry and John Randolph, on the Staunton river. (Howe's "History of Virginia," p. 212; also, "Sketches and Recollections of Lynchburg," p. 11.)

A digression here to remark a decided peculiarity in the naming of this stream may be pardoned. While both its upper and lower courses are known as the Roanoke, the intermediate section is known as the Staunton. This anomaly is said to have arisen from the fact that when white settlements were first established in this vicinity, in order to protect them from the incursions of the Indians, a company was organized to patrol the territory along the Roanoke river from the mountains to the mouth of the Dan, and placed under the command of a Captain Staunton. From the name of this officer, this part of the stream came to be called at first "Staunton's river," and later known as "Staunton river," by which name it appears on the map, and is known to the people of the surrounding counties, and doubtless will be so known until the end of time. This account of its naming, is, however, a matter of tradition rather than of record or history. Thomas Jefferson, in his "Notes on Virginia," does not enumerate it in his list of rivers, but calls the whole stream by its Indian name, "Roanoke," from source to mouth; but in the accompanying maps—Peter Jefferson's and Fry's—the whole western end of it, i. e., from its confluence with the Dan to its source, is put down as "Staunton."

At the beginning of the Revolutionary War, the Quaker proclivities which Mr. Lynch had imbibed in his youth and early manhood seemed to still influence his actions so far as to keep him out of active service in

arms. They did not, however, deter him from making himself thoroughly useful. At that time the whole of the mountainous section of Virginia was infested with Tories and desperadoes of the worst character, who burned and plundered the unprotected homes and property of the Continentals without mercy. Horse-stealing, too, owing to the fine prices paid by both armies for this class of property, had gained a marvelous popularity, and the unsettled condition of the time gave the thieves practical immunity from punishment. They were frequently caught red-handed in the act, but there was at that time but one court in the State for the final trial of felonies. The county courts were merely examining courts in all such cases. The trial court sat at Williamsburg, some two hundred miles from Campbell County, and the war rendered the transmission of prisoners thither, and the attendance of the necessary witnesses to convict them, next to impossible. The officers in charge of the prisoners would often be attacked by outlaws and forced to release their men, or be captured by British troops and themselves made prisoners of war. The efficacious operation of the civil laws was thus rendered out of the question. In addition to the aggravation of this state of affairs, it later came to Mr. Lynch's ears that a conspiracy was in active process of formation in his own community, the object of which was to overthrow the continental government, then considered extremely weak and as having very limited prospects of success, and to aid the British by every means possible. Mr. Lynch, therefore, in conjunction with his neighbors, Capt. William Preston, Capt. Robert Adams, Jr., Lynch's brother-in-law, and Col. James Calloway, decided to take active steps to frustrate the objects of the conspirators, and, in fact, to punish lawlessness of every kind, and restore, as far as possible, quiet to their harassed community. No one knew better than they the risks they were assuming, yet they made no attempt at secrecy. They or-

ganized a company for the purpose of effecting their objects, and, whenever practicable, called in to their aid such military volunteers as were accessible.

Mr. Lynch became the head of this organization, and, as another writer on the subject has said, "*his methods were striking.*" On this fact, and the pronounced and picturesque individuality of the man, must rest the curious circumstance of a person in this remote rural district so impressing the popular mind that his name should become identified forever with acts of mob violence, and constitute an integral part of the English language.

Under his direction, suspected persons were arrested and brought to his house, where they were tried by a court composed of himself, and the gentlemen above named, the latter sitting as associate justices. From this circumstance he was afterwards often called "Judge Lynch." The accused was brought face to face with his accusers, heard the testimony against him, and was allowed to defend himself, to call witnesses in his behalf, and to show mitigating or extenuating circumstances. If acquitted, he was allowed to go, "often with apologies and reparation." If convicted, he was sentenced to receive thirty-nine lashes on the bare back, and if he did not then shout "Liberty Forever," to be hanged up by the thumbs until he gave vociferous utterance to that patriotic sentiment. The death penalty was never imposed. When the accused was found guilty, he was tied to a large walnut tree standing in Mr. Lynch's yard, and the stripes inflicted without delay. It is said that they were laid on with such vigor that as a rule even the stoutest hearted Tory willingly, and even eagerly, yelled for "Liberty" without necessitating a resort to further means to bring his appreciation of that divine blessing notably to the surface. After the sentence of the court had been executed, the prisoner was released with words of counsel and admonition, which, in

connection with the facts already experimentally acquired, left him a wiser and more discreet, if not a better man. The requirement that persons convicted should "shout for liberty" is indicative of a sentimental, patriotic ardor characteristic alike of the man and the times.

One of the Tories arrested was found to have papers of great importance to the Royalists, and relating directly to the conspiracy against the Continental government. These documents were discovered ingeniously concealed in the cavity of a large, square bedpost. Owing to the amount and character of the information this conspirator evidently possessed, it was deemed unwise to allow him to go at large. After inflicting upon him the usual castigation, therefore, he was assigned lodgings in an outhouse on the premises, with a strict injunction not to leave the yard, under penalty of severe punishment. No guard was assigned to watch over him; but so thoroughly was he impressed with Mr. Lynch's methods, that his orders were scrupulously observed.

The fact that the death penalty was never imposed has been accounted for on the ground that the Quaker proclivities of Mr. Lynch, acquired in early youth, were never eradicated. This theory, however, appears equivocal, and it would seem far more probable that it was due to a native sense of humanity; for although it may be that the Quaker principles which at first influenced him were never entirely lost sight of, they certainly became so modified about this time as to admit of his making for himself a record in the sanguinary profession of arms.

Toward the close of the Revolution, he raised a regiment of riflemen from the surrounding country, and himself became its colonel. Marching southward, he joined General Greene in the Carolinas, and was present at the battle of Guilford Court House, fought March 15, 1781, holding position on Greene's right flank (Simm's

"Life of Greene," p. 186; Lee's "Memoirs of the War," third edition, p. 276), and, according to Howe, "behaved with much gallantry." Lee also extols the "noble" conduct of this command, while, along with other Virginia troops, "contending for the victory against the best officers in the British army, at the head of two regiments distinguished for intrepidity and discipline." (Lee's "Memoirs," p. 278.) After the surrender of Cornwallis in the fall of 1781, he returned home, and, it seems, disbanded his regiment; for the records of the Campbell county court show that at the first term of that court, which was held at the house of Micajah Terrell (a connection of the Lynch family), on Feb. 7, 1782, by virtue of a "commission of the peace and oyer and terminer" directed to Charles Lynch and several other prominent men of that time, Colonel Lynch was recommended by his associate justices to "His Excellency the Governor, as a suitable person to execute the office of a colonel of the militia of this county." Quite a number of orders also appear making various allowances to persons for supplies (thirty gallons of whiskey being mentioned among the lot) furnished "to Colonel Charles Lynch's volunteers on their march to the southward to join General Greene's army." These orders, of course, relate back to the volunteer regiment which he had commanded in the war. He retained command of the county militia until peace with Great Britain was fully established, and did not assume his duties as a justice of the county court until Feb. 5, 1784, on which date he took the oath of office.

Says Wirt's "Life of Henry": —

"There were many suits on the south side of the James river for inflicting Lynch's law"; and in order to protect the valued patriot defendants, the Virginia legislature found it necessary to pass for their benefit a special act of indemnification. This remarkable legislative enactment, rendering legal

the erstwhile illegal, may be seen in Henning's "Statutes at Large," vol. 11, p. 134. It is as follows: —

"1. Whereas, divers evil disposed persons, in the year one thousand seven hundred and eighty, formed a conspiracy and did actually attempt to levy war against the Commonwealth; and it is represented to the present general assembly that William Preston, Robert Adams, Jr., James Callaway, and Charles Lynch, and other faithful citizens, aided by detachments of volunteers from different parts of the State, did, by timely and effectual measures, suppress such conspiracy; and whereas, the measures taken for that purpose may not be strictly warranted by law, although justifiable from the imminence of the danger.

"2. Be it therefore enacted, that the said William Preston, Robert Adams, Jr., James Callaway, and Charles Lynch, and all other persons whatsoever, concerned in suppressing the said conspiracy, or in advising, issuing, or executing any orders, or measures taken for that purpose, stand indemnified and exonerated of and from all pains, penalties, prosecutions, actions, suits, and damages, on account thereof. And that if any indictment, prosecution, action, or suit shall be laid or brought against them, or any of them, for any act or thing done therein, the defendant or defendants may plead in bar, or the general issue, and give this act in evidence."

There is a trace of quaint humor discernible in the preamble to the above act in the delicate admission on the part of the legislature that "the means taken for that purpose may not be strictly warranted by law." It is notable, however, that the methods employed were declared "justifiable, from the imminence of the danger."

Not long after the close of the war, Colonel Lynch departed this life an honored and respected citizen, "leaving a large estate and the savor of a good name to his family." He was laid to rest in the family burying ground on his homestead plantation, and his tombstone bears this simple inscription: —

"In memory of Colonel Charles Lynch, a zealous and active patriot. Died, October 29, 1796; aged 60 years."

The old inhabitants of his neighborhood have still in circulation many amusing anecdotes illustrative of his habits and character, which have been handed down from his day and generation; and if, sitting by his winter fireside, you speak to one of these ancients of "lynch law," with a nod of his head and a mild chuckle at his recollection of kindred traditions, he will invariably repeat to you the following lines from the chorus of a once popular song commemorating the deeds of lynch law's founder and his gallant compatriots:

"Hurrah for Colonel Lynch,
Captain Bob and Calloway!
They never turned a Tory loose
Until he shouted "Liberty!"

The "Captain Bob" referred to in these lines was Captain Robert Adams, that being a sobriquet by which he was familiarly known. While no great amount of commendation can be heaped on the rhyming of this verse, as an exhibition of exuberant, effervescent, patriotic fervor it is glorious!

On the lawn of the old Lynch homestead, two miles from the present flourishing village of Lynch Station, on the line of the southern railway, still stands the old walnut tree on which lynch law was first administered. But no ghastly body ever dangled from its branches, and it never beheld punishment bestowed at the instigation of private spite. It bears the mark of extreme age, and is a picturesque object in the landscape. A part of it is now dead, but the rest is still vigorous and bears its annual crop of

nuts. It is not often in America, that estates remain in one family for over a hundred years, yet so it is in this instance. The sword of the fearless old soldier still hangs in the lofty hall, and the place, the property of his descendants, is one of the most charming and hospitable homes in southern Virginia. Situated in a beautiful valley, some twenty miles south of Lynchburg, it is bounded on three sides by an irregular range of hills, and on the fourth by lofty cliffs, beneath which flows the Staunton river, hurrying on to unite its waters with the Dan and once more become the Roanoke. "Avoca" is the poetic name now borne by this handsome and historic old manor. It was suggested by Moore's melody, "The Meeting of the Waters," and is peculiarly appropriate, "since," as says a contemporary writer, "this rich and smiling valley, where the Otter and Staunton rivers meet, after winding downward by crags and peaks from their sources in the Blue Ridge, is truly another 'Vale of Avoca.'"

It may not be amiss to add, in concluding this sketch, which necessarily involves a discourse very personal to Colonel Lynch, that nearly all of his descendants have arisen to positions of greater or less prominence in their several communities. Among them may be noted governors and generals, and one of the youngest generation, born and reared in his old homestead, is now a captain in the United States volunteer army, at present on duty in the Philippine Islands.



LONDON LEGAL LETTER.

LONDON, Feb. 3, 1900.

I HAVE from time to time spoken of the difference between the customs and the procedure of the English and American courts. I do not refer to the rules or orders of the courts or the laws upon which they are based, but to the daily life in and about the courts. It is in these little matters of small differences that many busy workers, who are fond of the details of their work, find the greatest interest in visiting our courts. An illustration of some of these petty contrasts was suggested a few days ago. At the recent annual meeting of the Incorporated Law Society at Dover, the president of the society took the grounds that the courts should not sit on Saturday. The very suggestion indicates the wide difference in the daily life of a judge in England and his brother in America. Here the courts sit on ordinary days from half-past ten to four o'clock, with a mid-day interval of half an hour; on Saturdays they sit from half-past ten to two o'clock without a break. Hence the working hours of a judge in the course of a week are only twenty-eight hours and a half. As the judge gets a salary of twenty-five thousand dollars a year, with ten weeks holiday at the long summer vacation, three at Christmas, two at Easter, and ten or eleven days at Whitsuntide, with a pension of fifteen thousand dollars a year on retirement, the American judge may naturally think the lot of his brother on the English bench is greatly to be envied, and he may well wonder how the volume of litigation can possibly be got through with under such circumstances. And yet, if the truth were told, I have no doubt that the English judges despatch more business in their short hours than the American judges in the very much longer time they are compelled to remain on the bench. In the first place,

there is no other business transacted in the English courts than the trial of cases. There is no "motion for hour" in the morning; there is no calling of the judge's docket to see what cases are to be tried; there are no applications for the postponement of cases or the carrying over of them to next term, and there is no time given up to "law days" or the arguments of law points. The moment the judge takes his seat, the first case is called and it is proceeded with. If the plaintiff is not "ready," it is dismissed with costs; and if the defendant is unprepared, there is judgment for the plaintiff, and the next case is called. This may seem harsh and arbitrary, but it is remarkable how few cases there are of illness of litigants or of important witnesses. There may be something in the climate that conduces to good health, but there is doubtless a good deal more in the knowledge that even a physician's certificate is discredited, and the realization of the heavy costs which are inflicted when a case is dismissed or judgment by default is taken. It should, of course, be remembered that in nearly every case there are two counsel on each side, a junior and a Queen's counsel, and it is not often that both of them are engaged elsewhere when a case is called for trial. If it should so happen the conflict of engagements would be anticipated, and one or other of the counsel would get some one to do the case for him.

In the next place, there is no time wasted in the examination of jurors upon this *voir dire*. Such a thing is practically unknown, although the rules provide for it. The first twelve men called in to the jury box are sworn at once, unless some potent physical infirmity in some one of them is observed by the judge, and the trial is begun. The moment it is ended, the next case is called,

and the same jurors, who, in all probability, have not left their seats to find their verdict, remain in their places to hear it. The only exception is when the case has been a protracted one, lasting for more than a day, in which case heed is paid to their physical exhaustion. It is no uncommon thing for the same jury to sit in three or four consecutive cases.

Then there is no interruption by opposing counsel, during the examination of witnesses, to object to the form or trend of counsel's questions or to the evidence. The exclamation "I object!" is rarely heard in the English courts, and the counsel who uttered it more than once in the course of the trial of a case, unless he had the very best grounds for doing so, would regret his conduct, for he would doubtless be told from the bench, with withering sarcasm, that it was the judge's function, and not counsel's, to direct the course of procedure in that court. As to the rash man who might have the courage to command a witness not to answer a question put to him until counsel had had the opportunity to argue it, words fail to express the dressing down he would receive for his impertinence from such a judge as the Lord Chief Justice. In fact, no skillful advocate in this country would dream of prejudicing his case by interrupting his adversary with objections to his method of examining a witness or to the evidence of the latter. It is assumed that counsel are sufficiently acquainted with the rules of evidence to know what is relevant and competent, and that the judges are sufficiently alert to keep too willing witnesses within bounds. An advocate who, knowingly and designedly, transgressed the rules would have so little credit with the courts that he could not be employed by solicitors, however much they might be disposed to encourage his practices. He simply could not win their cases for them.

Above all the judges study to economize their time and that of the public. The rules

require that copies of the pleadings be lodged in court beforehand, for the use of the judges. These enable the latter to familiarize themselves with the issues. With the pleadings are also handed up to the bench, in many instances, copies of the correspondence and the documents which are relied upon. These documents, long before the trial, have been "produced" and "inspected" and "admitted" by the parties, and accordingly the time that would otherwise be consumed in calling witnesses to prove them is saved. The judge, therefore, before the case has been formally opened, knows enough about it to assist both counsel in getting at all the facts, and to prevent either of them from dragging in irrelevant matter. And, finally, the judge, if he is sitting without a jury, rarely takes a case under advisement or, as is said here, "reserves judgment." He proceeds at once to decide the matter, and in such a way that there is not, in four cases out of six, any appeal from his decision.

A good deal of the success which attends the judges' labors comes from the fact that they are determined to be judges in the strictest sense of the word, and not merely presiding officers in courts of law to preserve order between wrangling counsel. How far they carry the function of a judge as a judicial determinor of law and facts could hardly be realized by Americans. In the county courts it is no unusual thing when a woman, for example, is sued by a dress-maker and the defense is that the dress does not fit, for the judge to require the defendant to retire, put on the dress and reappear in the witness box in the disputed garment in order that he may see for himself what truth there is in the contention.

It is perhaps largely on account of the way justice is meted out in this homely fashion that the county courts are becoming more and more popular every year.

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FACETIÆ.

THE story is told that Daniel Webster, when on his way by stage-coach to Washington once, was looked upon with suspicion by his travelling companions. Finally one of the latter tapped him on the knee and said,

"How far are you going?"

"I am going to Washington," answered Webster.

"Are you a merchant?" continued the inquirer.

"No, I am a Senator," replied Webster.

"Well, well!" exclaimed the other, holding out his hand. "I am relieved. We feared you might be a highwayman."

THE late Isaac H. Bromley, for many years a writer of New York *Tribune* leaders, was noted for his spontaneous and happy wit. One day, in the *Tribune* office, the veteran journalist, Charles T. Congdon, was talking of the delightful reading he had found in Bayle's "Dictionary," and remarked that, if he were ever in jail, he would be quite contented with that book. "Of course you would," said Bromley. "If you had Bayle, you could get out!"

ON THE WRONG TACK.—It was at the police court. A witness for the defense had been examined, when the complainant's lawyer stood up to crush him.

LAWYER: "Why did you hide Sullivan in your house on that Sunday night?"

WITNESS: "I did not see Sullivan at all on that night."

LAWYER (knowingly): "Will you swear your wife did not hide Sullivan on that night?"

WITNESS (hesitatingly): "Ye-es."

LAWYER (more knowingly): "Will your wife

swear that she did not hide Sullivan in your house on that night?"

WITNESS (more hesitatingly): "Well—I—don't—think—so."

LAWYER (triumphantly): "Ah! Perhaps you can tell the court how it is you can swear your wife did not hide him, while she cannot swear the same thing. Speak up now and tell the truth."

WITNESS (unhesitatingly): "Well, you see, I'm not a married man."

LAWYER: You say that you were in the saloon at the time of the assault referred to in the complaint?

WITNESS: I was, sir.

LAWYER: Did you take cognizance of the bar-keeper at the time?

WITNESS: I don't know what he called it, but I took what the rest did.

WHETHER we become possessed of property through the kindly testamentary consideration of our relatives or acquire the same by the sweat of our brows, there are very few of us whose generosity exceeds our power of retention. That the ruling passion is strong in death, was made evident recently on the occasion of the making of his will by one of the rural gentry in the vicinity of Boston. This person had acquired a substantial property, and, upon the suggestion of friends, went to the office of one of the leading attorneys of the Hub to dispose of his earthly goods in true legal style. He was sound in health and mind, but the giving away of his property was an unpleasant and unwonted experience, and a slow one. He had spent most of the afternoon in directing the making of bequests and legacies, and had taken up his hat preparatory to going, when the lawyer said to him: "Well, Mr. Smith, what are you going to do with the house in which you live?" This query touched a tender spot, and, with eyes brimming with tears and in a voice trembling

with emotion, he said: "Well, I have given so much away this afternoon that I guess I'll keep the old home for myself."

NOTES.

THE names of habitual drunkards are posted in public places in Kenosha, Wis., and the other day the common council passed an ordinance providing that habitual drunkards who have been posted "have tintypes or photographs of themselves attached to the poster, and that unless the parties so posted are able to pay for said photographs, then the relatives be required to stand the expense. In case there are no relatives, then the city is responsible for the cost."

THE American Bar Association, at its August meeting, 1899, adopted the following resolutions:

"The special committee to whom was referred the resolution of the Illinois Bar Association regarding "John Marshall Day," also the pamphlet entitled "John Marshall Day," containing endorsing responses of eminent judges, jurists and bar associations, also a letter of President McKinley and of the Hon. David B. Henderson, of Iowa, member of Congress, offer the following recommendations:

"First — That Monday the fourth day of February, 1901, be observed by the bench and bar of the United States as "John Marshall Day," in the spirit of the resolution of the Illinois State Bar Association.

"Second — That a committee of fifty-one (representing States and Territories and the District of Columbia) be appointed by the President from the membership of this Association, charged with the duty of publishing an address to the legal profession of the United States, setting forth the purpose of the observation of "John Marshall Day." Said committee is charged with the further duty of preparing suggestions for the observance of said day on the part of State, City, and County Bar Associations and other public bodies in the United States.

"Third — That the said committee be authorized to request the good offices of the President of the United States in recommending to Congress the propriety of observing "John Marshall Day" on the part of Congress and other departments of the Government of the United States.

"Fourth — That Congress also be memorialized to observe such ceremonies in honor of the great Chief Justice, who was himself a member of that body in 1799, as in their judgment be deemed proper.

"Fifth — That said committee be further authorized to request colleges, law schools, and other educational bodies of the United States to observe public ceremonies on said day.

"Sixth — That said committee be authorized to adopt such other measures as in their best discretion may be deemed appropriate for the furtherance of the project.

"Seventh — That said committee be given full power to act in the premises and report progress at the next session of their association."

The movement for an observance of "John Marshall Day" is awakening a lively interest throughout the country, and not only the legal profession but citizens generally will unite in the effort to make its celebration worthy of the great jurist.

BIGAMISTS in Hungary are compelled to submit to a queer punishment. The man who has been foolish enough to marry two wives is obliged by law to live with both of them in the same house.

THE queer names given to tracts of land by the owners in olden times are illustrated in a conveyance encountered by a clerk in the Baltimore record office recently, while engaged in re-organizing the indexes. The deed in question is recorded in Liber W. G., No. 60, folio 57. It was executed in 1799, and conveyed from Joshua Stevenson to Richard Gittings, five tracts of land in Baltimore County, the consideration being \$1,000. The name of each tract and its dimensions are as follows: "My Sweet Girl, My Friend and Pitcher," 62 acres; "Here is Life Without Care and Love Without Fear," 41 ¼ acres; "The Unexpected Discovery," 262 acres; "Hug Me Snug," 15 ¼ acres, and "Stevenson's Cow Pastures, With Little I Am Content," 22 acres.

It was Horace Smith, who, at the close of some strictures upon barristers as a class, qualified his remarks by saying, "All briefless barristers will please to consider themselves excepted from the previous censure, for I should be really sorry to speak ill of any man without a cause."

THE Civil Tribunal of the Seine has recently decided a novel kind of a libel case, for such it was, although technically it took the form of an action by a widow for damages for the loss of her late husband. He was severely criticised lately in some articles in a trade paper called *L'Echo des Chemins de Fer*. He took the criticisms very much to heart, so much so that he committed suicide. He left a widow and one child. The wife, being of opinion that her husband's death had been caused in reality by the articles in question, sued the proprietors of the paper for £2,000 damages. The court in its judgment held that as the husband's suicide was brought about by calumnious imputations and menaces, the proprietors of the paper in which they appeared were responsible, and awarded the full amount of damages claimed, at the same time condemning the defendants in cost. Apparently the Code Napoleon does not act on the maxim, *Actio personalis moritur cum persona*.

THE Ohio Supreme Court is to be congratulated on its improved accommodation now being built at Columbus. Practically the whole building will be devoted to the Court and its law library, the entire second floor being occupied by a fine, large court-room with adjoining consultation rooms and private rooms for the judges, while the law library occupies the greater part of the first floor.

While the library room will be very handsome, it is unfortunate that library convenience has been so much subordinated to architectural effect. A gallery, unnecessarily massive and wasteful of space, occupies three sides of the room. Main floor and gallery will be shelved in alcove style, and if books are shelved to occupy the full height step-ladders must be generally used, or if not so shelved about three feet of space is wasted on each floor. It is doubtful whether the windows will satisfactorily light the gallery, and the heavy gallery floor cuts off all light from below.

Handsome iron galleries and shelving would have best assured the essential features of modern library construction, *namely* capacity and elasticity for growth, light and air, safety and convenience. The height of the new room would allow three such galleries, but two would give the same capacity as the proposed arrangement, and a third one when later needed would provide for

future growth. Better light and air would be assured by the use of glass or iron-grated gallery floors. There would be no sacrifice of strength, and all shelves would be accessible from the floor.

With all these advantages secured there need be no sacrifice in the appearance of the room, depending upon the architect's selection of iron work. It is unfortunate that the best *practical* results should have been so unnecessarily sacrificed to looks.

INTERESTING GLEANINGS.

THERE are 10,982 advocates, solicitors and procurators in Italy whose gross incomes, according to the income tax returns, amount to \$3,462,615, which gives an average income of about \$315. Of these legal men, five profess to have an income of \$6,000, eight of \$5,000, sixteen of \$4,000, seventy of \$2,000, and 5,508 return theirs as under \$200, which leaves a balance of nearly half the total number — 5,375 — to divide among them \$2,087,015, which gives an average income to each of a little over \$386. Architects and civil engineers fare still worse.

PERHAPS in no other church in the world can be seen anything like the ornaments which grow in an old church in Ross, Herefordshire, England. They are two thriving elm trees, which naturally sprouted from the pavement of the edifice and stand one at each end of a pew. This pew was, many years ago, occupied by John Thyle, who spent a great deal of money planting elms in Ross, his native town.

HUDDERSFIELD, Eng., must be the paradise of those who believe in municipal ownership. Every artisan, it is said, lives in a house owned by the city, comes to his work on a municipal car and gets his light, heat, bread, butchers' meat, bathing, recreation, hospital care and medical attendance from municipal establishments. We believe, however, that he has to bury himself.

WHAT SHALL WE READ?

A forthcoming volume which will be welcomed by seriously inclined general readers, as well as by philanthropic workers, is Riis's *Ten Years' War*, which is to be published by Houghton, Mifflin & Co. No one among those who have battled with the slum has won greater respect for his sincerity, or greater regard for his knowledge of the subject, than Mr. Riis. Among the constantly increasing class of those who are students of the slum problem, or actual workers in it, the publication of the *Ten Years' War* will be awaited with interest.

The Macmillan Company publish a book on

Henry Irving which should be of interest to his American admirers at this time. It is a record and review of his life by Charles Hiatt, who wrote also a similar book on Ellen Terry. The portrait by Millais, and many others from photographs, add to a very complete view of his career and work.

JUST now when the two leading nations are struggling for domination in the remote quarters of the globe, Professor Franklin H. Giddings' work on *Democracy and Empire*, published by The MacMillan Company, will probably be read with something more than interest. His "Principles of Sociology" which has been translated into French, German, Italian and Russian has made him known to a large audience, and his new book will consequently be construed by foreigners as the opinion of a large body of thoughtful Americans. Mr. Giddings believes that "only when the democratic empire has compassed the uttermost parts of the world will there be that perfect understanding among men which is necessary for the growth of moral kinship."

To Have and to Hold,¹ the stirring novel of the Jamestown settlement, by Mary Johnston, whose "Prisoners of Hope" won such unstinted praise from the critics and such wide attention from the reading public, has just been published by Houghton, Mifflin & Co. Miss Johnston has come forward as a storyteller with no adventitious aids, but simply upon the merits of her literary work, and the two works already published have placed her at once in the front rank of American writers. *To Have and to Hold* ends in a manner more in keeping with the "lived happy ever after" of the romantic tradition than did her first, and strongly stirring tale, "Prisoners of Hope." The volume is the result of much study on the author's part as to pictures of life and manners of the day, as shown in old and not easily accessible records, while the charming intimacy with nature, everywhere shown in her descriptions of scenes and places, could only have been gained by living the out-of-door life which it is said the author lived as a child and young girl, not far from the Virginia Natural Bridge. The book is brought out in a very handsome style. Eight illustrations have been drawn for it by Howard Pyle and his pupils.

TO HAVE AND TO HOLD. By Mary Johnston. Houghton, Mifflin & Co., Boston and New York. 1900. Cloth. \$1.50.

NEW BOOKS FOR LAWYERS.

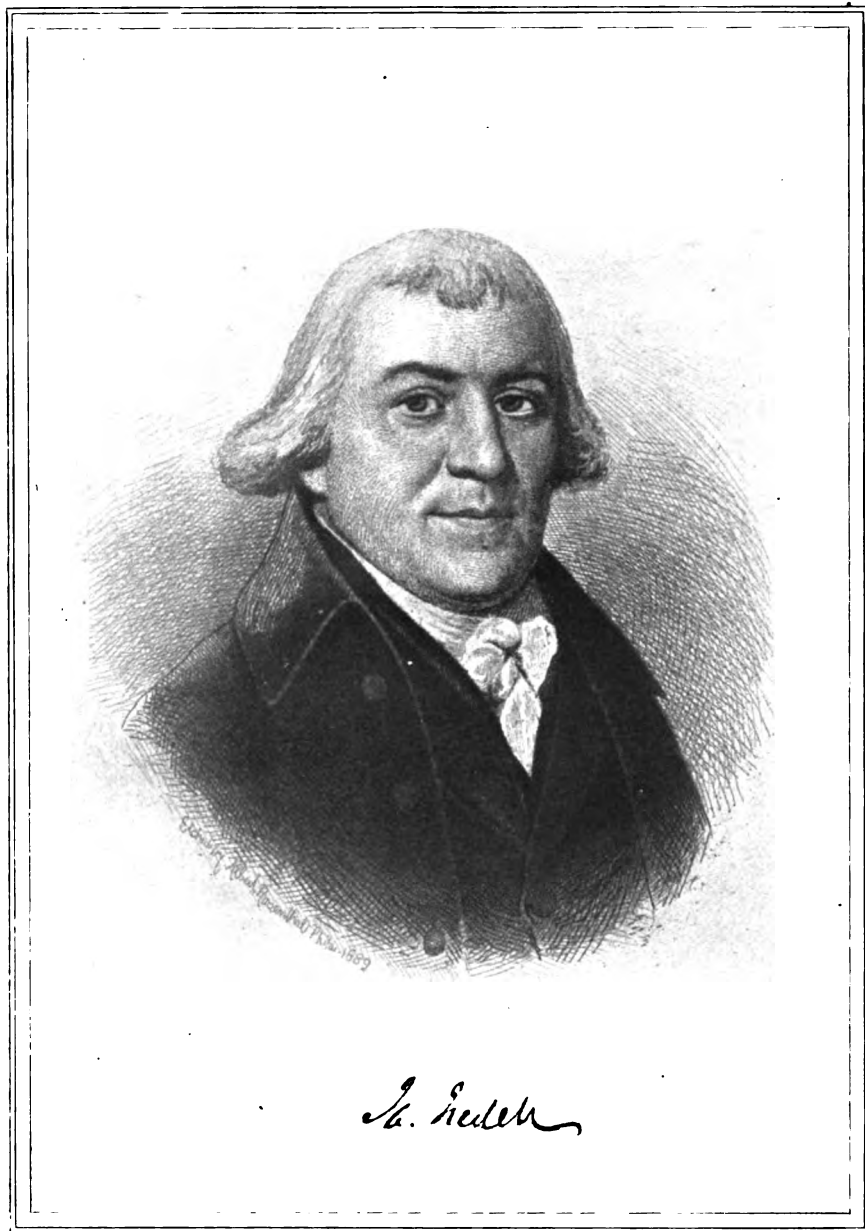
THE JOURNAL OF THE FEDERAL CONVENTION OF 1787 ANALYZED; the Acts and Proceedings there-of Compared; and their Precedents Cited: In

Evidence of the Making of the Constitution for Interpretation or Construction in the Alternative, according to either the Federal Plan or the National Plan; That by the latter Congress have General Power to Provide for the Common Defence and General Welfare of the United States; Direct Taxes are Taxes Direct to the Several States, in Contrast with Duties extending throughout the United States, which are Indirect Taxes to the Several States; and the Limits of the Union are co-extensive with the Bounds of America. By HAMILTON P. RICHARDSON of the Wisconsin Bar. The Murdock Press, San Francisco, 1899. Cloth. \$3.50.

There is no question of more importance to the people of the United States than the true interpretation of the Constitution, and in order to arrive at the solution of this question, Mr. Richardson makes a searching analysis of the Journal of the Federal Convention of 1787 and compares and considers the proceedings *as a whole*. The conclusion at which he arrives, if true, offers consequences of the highest moment to questions the people are now confronting.

The book has two parts, dividing on the date, July 26, when the Convention (being near two-thirds through the period of its existence) finally agreed upon its resolutions and referred them to a committee of detail to report a constitution conformable thereto. Part one deals with the papers which were the subject of consideration by the Convention prior to that date, those papers which state the Constitution in mass; and Part two considers those papers which come after that date and state the Constitution in detail. The first set of papers are (1) the resolutions called the Virginia Plan; (2) the resolutions of the Convention in committee of the whole house; (3) the resolutions called the Jersey Plan; (4) the resolutions of the Convention in convention. The second set are (1) the Pinckney Draft; (2) the draft reported by the Committee of Detail; (3) the revised and arranged draft; (4) the Constitution as signed. All these papers are set out at large, analyzed, compared throughout, and their sources traced in precedent constitutions. Then follows a summary of the whole period from September, 1874, through September, 1887; then chapters setting out what the Journal discloses as to the powers of Congress, direct taxes, the limits of the Union, and the power of interpretation of the Constitution; and the book ends with the instrument set out at large with interpretive clauses interpolated in black-letter type.

The book is very compact in style, and appeals to lawyers and all students of the Constitution and its history.



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JAMES IREDELL.¹

BY JUNIUS DAVIS OF THE NORTH CAROLINA BAR.

JAMES Iredell was born in the quaint and historic old town of Lewes, Sussex County, England, on the 5th October, 1751. He was the oldest child of Francis Iredell, a merchant of Bristol, who had married Margaret McCulloh. Through his mother he was nearly related to Henry McCulloh and his son Henry Eustace McCulloh, who owned immense bodies of land in North Carolina in the last century, and this relationship was destined to have important influence upon his after life. When he was about sixteen years of age, his father, through misfortune and ill health, became so reduced in estate that his relatives came with loving care to his aid. It was but natural that they should seek to advance the eldest son, and secure for him a position in which, in time, he could be a help and prop to his parents in their declining years. Through the influence of his relative, Sir George McCartney, on the 29th of February, 1768, Iredell was appointed Comptroller of the Customs at Edenton, to which place he came in the latter part of 1768. And, as an incidental duty, the McCullohs put upon his shoulders the supervision of their interests in Carolina, without any suggestion or thought on their part of recompense to him for the labor.

It seems that in the effort to secure this appointment for him, his youth was studiously concealed in the very reasonable fear that knowledge of it would be death to the hope. The very suggestion of a lad of sixteen to be

Comptroller of His Majesty's Customs would have seemed ridiculous even to the careless Charles. But how shall we speak our admiration of the high spirit, the stout heart, the self-reliant courage of this boy, who, tenderly reared and carefully nurtured, in obedience to the call of duty leaving all that were near and dear to him, crossed 3,500 miles and more of ocean to assume the unknown duties of a responsible office in a wild and new country, where the red man yet boasted himself the master and the white man barely clung to the shore by the tips of his fingers! But it was duty that called him, and duty and filial love that impelled him to promise to send to his parents all the salary he should receive from his office. And it is pleasing to know that this promise was religiously kept and that he faithfully remitted all his salary to England, only reserving the scanty fees of the office for his maintenance. And so was the boy the father to the man.

Edenton was then but a village of a few hundred inhabitants, but in and around it dwelt many gentlemen of means, of culture and of learning, who were among the first in the Province and destined to be leaders in the coming movement which lost Great Britain her great plantations. Here he met Harvey, Hewes, Jones, Charlton, Dawson, the Johnstons and others, and soon became their friend and constant companion. Among them was Samuel Johnston, of the family of "the gentle Johnstones of Annandale," whose sister, Hannah, Iredell afterwards married, and whose example and influence more than all else shaped his future career.

¹ From an address delivered in presenting the portrait of Justice Iredell to the Supreme Court of North Carolina.

Soon after he had become familiar with the duties of his office, Iredell commenced the study of law under Samuel Johnston. Alternating his devotions between his law books and his lady-love, and equally diligent in his application to both, in two years after his arrival, and while in his nineteenth year, on the 14th of December, 1770, he received a license from Governor Tryon, with the approbation and recommendation of Chief Justice Howard — that “*eminent vagrant*,” as Jones styles him — to practice law in the inferior courts of the State.

On the 26th of November, 1771, he obtained a license from Governor Martin to practice in the Superior Courts, and became a full-fledged lawyer. McRee tells us that when he first appeared at the bar “*he had a difficulty to encounter which but few experience and fewer surmount as he did*. He had a natural impediment in his speech which would have abashed and discouraged weaker minds, if possessed of but half of his delicate sensibility.” But even this impediment was conquered by the stout courage of his heart, and he soon stood among his seniors as their equal.

In 1771, the restless tide of discontent, stimulated by the arbitrary measures of the Crown, and swelling with the news of the Boston massacre, was steadily rolling and spreading as it went through the Colonies, and nowhere with more resistless force than in North Carolina.

Iredell, though yet scarce aware of it himself, was already in the current and drifting toward the day when he was to stand boldly forth for the cause of liberty.

In 1773, the dispute in this State over the Court Acts, which had been rife for some time, culminated. The Assembly insisted upon the right of attachment against foreign non-residents, and the Crown was equally insistent against granting it. The terms of the judges and the life of the courts had expired by limitation. The Assembly passed new laws for the creation and organi-

zation of the courts and tacked the attachment law to it. The Governor refused his assent and dissolved the Assembly, leaving the Province without courts and without laws. For some time there were only five provincial laws in force, and the only courts were those held by single justices of the peace. In fact, the courts and the supreme majesty of the law were not fully re-established in North Carolina until November, 1777. Crime went unpunished, wrongs were unredressed, and person and property alike were without the security and protection of law. This condition of affairs was but the forerunner of the coming storm whose mutterings were already growing nearer and clearer, presaging “*the lean famine, quartering steel and climbing fire*” that were so soon to desolate the land.

On the 18th of July, 1773, Iredell married Hannah Johnston. Their union was a most happy one in every respect. She was a loving wife, a prudent and faithful administrator of the domestic economies of their household, and a wise and able friend and counsellor to whom he ever brought the full story of his joys and triumphs, his sorrows and reverses. The charming letters which passed between them are the highest evidence of their loving devotion to each other, their mutual trust, confidence and respect.

In 1774, the Revolution was well on in North Carolina. Harvey, Johnston, Harnett, Hooper and others were in active correspondence and zealously engaged in preparing and shaping public sentiment to meet with ready courage the approaching crisis. Iredell was an active but silent participator and adviser in all their councils. Although scarce twenty-three years of age he was already in full maturity of mind, of judgment, and of action. Springing at a bound from youth into the full panoply of manhood, he stood and moved among the foremost men of his time as their peer, and his advice and opinions, on all questions of public moment, were eagerly sought and deferred to by them.

William Hooper, then some thirty-two years of age, was easily one of the ablest and most prominent men in North Carolina as a scholar, a lawyer, a statesman, and a patriot. On the 26th April, 1774, we find him writing to Iredell — "I am happy, my dear sir, that my conduct in public life has met your approbation. It is a suffrage which makes me vain, as it flows from a man who has wisdom to distinguish and too much virtue to flatter. . . . *Whilst I was active in contest you forged the weapons which were to give success to the cause I supported.* . . . With you I anticipate the important share which the Colonies must soon have in regulating the political balance. *They are striding fast to independence*, and ere long will build an empire on the ruins of Great Britain."

In this short extract we are forcibly impressed with three things: Hooper's deferential appreciation of the approbation of Iredell, his graceful recognition of the great assistance which Iredell was even then rendering to the patriotic cause, and his bold and early declaration for the independence of the Colonies. And yet Hooper was the man whom that great apostle of the people, Thomas Jefferson, a few years later, in the bitterness of envy and jealousy, declared to have been the greatest Tory in Congress. The falsity of this accusation is plainly apparent to any person who has ever followed Hooper's course during these troubled times. Fortunately for him and fortunately for his State, his unwavering devotion and loyalty to the cause of freedom, and his unfaltering determination to achieve independence at any and every cost, has been faithfully recorded by the brilliant and erratic Jones in his celebrated *Defence of North Carolina*. It is evident that Hooper was alluding in this letter to the project of a Provincial Congress, the first of which met in New Bern on August 25, 1774, with John Harvey as Moderator. John Harvey, William Hooper, Samuel Johnston, James Iredell and Willie Jones were the five men who projected and, more

than all others, accomplished this assembly of the people.

The second Provincial Congress in North Carolina assembled at New Bern on the 3d of April, 1775, and, although he was not a member, so fully was he in sympathy with the movement that Iredell went there to assist with his counsel and advice so welcome to all.

The events that followed are matters of common knowledge: Martin's frothy proclamation, the grim defiance of Congress, his flight to Wilmington and final refuge on the sloop of war *Cruiser*. In November, 1776, Iredell was appointed by the Congress one of the commissioners to revise the laws of the State, and it is said that the celebrated Court law of 1777 was the work of his pen. In November, 1777, the law courts were re-established; and, on December 20, Samuel Ashe, Samuel Spencer, and James Iredell were elected the first judges of the free and independent State of North Carolina. Iredell was then barely twenty-six years of age. He had been warmly urged by his friends for the office of Attorney General, which it seems he would have preferred, but was defeated in that by Waightstill Avery, whom he was so soon to succeed. In June, 1778, he tendered his resignation to Governor Caswell, who received it with great reluctance, saying, that he well knew the place could not be supplied "by a gentleman of equal abilities and inclination to serve the State in the important duties of that office."

In January, 1779, when the Assembly was about to appoint Delegates to Congress, it expressed through the Speaker, to Iredell, who happened to be present, its desire to appoint him, but what he called his poverty compelled him to decline with reluctance.

On the 8th of July, 1779, Iredell was appointed, by Governor Caswell, Attorney General in place of Avery, who had resigned. We have all reflected with sympathetic pity upon the weary and toilsome life of that poor and patient servant of the Lord, whom the

irreverent were accustomed to call the "Circuit Rider," and yet his travels were but a summer day's journey, compared to those of the leading lawyers of Iredell's time. When the courts opened they followed the judges, from Edenton to Hillsboro, from Hillsboro to Halifax, from Halifax to Salisbury, from Salisbury to Wilmington, and from Wilmington to New Bern. Their way lay through the wilderness, over swollen rivers, through pestilential swamps, through rain and snow, hailstorm and sunshine, their usual conveyance a one-seated gig, and their lodging place as chance and the fortunes of the road might determine. The duties of his office entailed upon Iredell so much arduous labor and brought with it such small compensation that in 1782, when peace was assured by the surrender of Cornwallis, he resigned to become again what he called "a private lawyer." Cases and clients came to him rapidly, and in July, 1783, he writes his brother that he had a share of practice "very near equal to any lawyer in the country."

In 1786, following the passage of the Confiscation Acts, the question of the power of the court to declare void an act of the Legislature because in conflict with the Constitution, was raised in this State by some of the bar and was vigorously supported by Iredell in an exceedingly strong and able pamphlet. In this pamphlet, which was published in the New Bern paper of August 17, 1786, Iredell says: "It will not be denied, I suppose, that the Constitution is a *law of the State*, as well as an act of the Assembly, with this difference only, that it is the fundamental law and unalterable by the Legislature, which derives all its powers from it. . . . An act of Assembly inconsistent with the Constitution is void, and cannot be obeyed without disobeying the superior law to which we were previously and irrevocably bound."

In the celebrated case of Doe on Dem. of Bayard *v.* Singleton (1 Martin, 41, at May Term, 1787), in which Iredell, Johnston and Davie were counsel for plaintiff, and Moore

and Nash for defendant, that question was first discussed and decided in the courts of this State. In reading the report of this case, one is struck with the great and proper reluctance of the judges to approach the decision of the point so novel and strange. They suggested to the litigants first one and then another method of compromise and settlement; but, driven to it at last, they faced the issue as true men. Mr. Haywood, in his argument in Moore *v.* Bradley (2 Haywood, 140), attributes the merit of that opinion to Judge Ashe, and says that he illustrated his opinion by this forcible language: "As God said to the waters, 'so far shall ye go and no further,' so said the people to the Legislature." Afterwards, when upon the Supreme Bench of the United States (in Calder *v.* Bull, 3 Dallas, 386, and again in Chisholm *v.* Georgia), Iredell took occasion to declare in emphatic language his opinion to be, "If any act of Congress or of the Legislature of a State violates those constitutional provisions, it is unquestionably void; though I admit, that, as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case." This doctrine, so clearly and admirably stated in these few and concise words, is now the law in every State of this Union, and is universally taken to have been so settled by the opinion of Marshall in Marbury *v.* Madison (1 Cranch, 137). I cannot but think it singular that, in his opinion in this case, Marshall makes no reference whatever to either of the three cases above mentioned or to the earlier cases in Rhode Island and Virginia. The language of Iredell, in Colder *v.* Bull, is so clear cut and logical that it could not have escaped the notice of the Chief Justice. In our busy life we seldom pause to reflect upon the far-reaching results, the inestimable blessings of these decisions. How often in our history has Congress and Legislature in the mad lust of power and the wild riot of party hate, striving to accomplish unholy and unwholesome legislation,

been halted by the stern mandate, "so far shall ye go and no further." England's greatest statesman once said, "The poorest man may in his cottage bid defiance to all the force of the Crown — it may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement. But this vaunted liberty of the British subject can bear no comparison to that of the American citizen, who, dwelling under the shadow of the mighty Constitution, is secured by it in the fullest enjoyment of his life, his property and his liberty.

In the famous state trials at Warrenton in January, 1787, Alfred Moore prosecuted for the State and Iredell and Davie defended.

In November, 1787, Mr. Iredell was appointed by the General Assembly a member of the Council and sole Commissioner to revise and compile the acts of the General Assemblies of the late Province and present State of North Carolina. This task was faithfully and ably executed by him, and the work, printed in 1789, afterwards became widely known and celebrated as "Iredell's Revision."

In 1787, the question of the adoption of the new Federal Constitution was agitating the people. Iredell was one of its ablest and most energetic advocates, and by his labor and eloquence more than any one else contributed to its final ratification and adoption in November, 1789. In January, 1788, he published a long and most admirable pamphlet in its support in reply to the objections of George Mason. He was a member of the convention which met at Hillsboro on July 21, 1788, to consider its adoption. Alfred Moore and William Hooper were both candidates for this convention. In instance of the strong ties of friendship which bound these two men together we read that Moore, certain of his election in Brunswick, and fearing Iredell's defeat in Chowan, urged Iredell to become a

candidate from Brunswick. Preferring to represent his own people, however, he fortunately declined and was elected, while Moore and Hooper were both defeated. In this convention Iredell was the leader of the Federalists, and the burden of the argument for his party was thrown upon his shoulders. McRee tells us: "He defended, he removed objection, he persuaded, he appealed to interest, and awakened into life the spark of national pride. His vigor, and the extent and variety of his attainments, excited the admiration of his adversaries. His words were neither too few nor too many, but such as were in common use and conveyed his ideas clearly and distinctly to the simplest understanding; his style was terse and condensed; his arguments, direct and solid, struck the mark with the force of cannon balls."

Though not successful he was not defeated, for the convention would neither reject nor adopt. His fame had now reached far beyond the limits of his State, and Washington, led to a conviction of his great abilities by his debates in the convention and his answer to Mason's objections, appointed him to the Supreme Bench of the United States in place of R. H. Harrison, who had declined.

On the 10th of February, 1790, Pierce Butler, of the Senate, writes him: "You have this day been nominated by the President and *unanimously* appointed by the Senate to the Supreme Federal Bench. I congratulate the States on the appointment, and you on this mark of their well-merited opinion of you." That he had won the respect and confidence of Washington is well known to us. In a letter of February 1, 1790, his distinguished brother-in-law, Samuel Johnston, then a member of the lower house of Congress, tells him: "I have just returned from dining at the President's with a very respectable company. . . . The President enquired particularly after you, and spoke of you in a manner that gave me great pleasure." His commission was dated February 10, 1790,

and his first services were on the circuit, where with Rutledge he rode the Southern Circuit, then composed of South Carolina and Georgia, North Carolina not having adopted the Constitution when the Judiciary Act of 1789 was passed. He first took his seat on the Supreme Bench at the August Term, 1790, when, after the reading of his commission and the admission of a few counsel, the court adjourned from the lack of business.

Let us pause here for a brief moment and think upon the work which was carved out for the members of that Court. The questions that were to arise before them were in the highest degree grave and important. An entirely new field of jurisprudence was opened out in which they were to find no precedents. The unique questions of the amenability of the States to the process of the Court, their relations to the Federal Government, the limitations and definitions of the powers of the Federal Courts, the interpretation of the Constitution, the independence of the Federal judiciary as a co-ordinate branch of government, the obligations of the Treaty of Peace, the extent of the power of Congress to levy taxes and duties, questions of prize, the Confiscation Acts, patent rights, violations of the embargo, land laws, ownership of slaves, citizenship, and many others, of like importance and first impression, were to be raised, argued, and decided. And when we reflect upon the magnitude of their task and of their successful elucidation of the intricate judicial problems brought before them, we cannot withhold our wonder, our admiration and our reverent respect for the first judges of the Federal Supreme Court. Speaking of its first meeting, Mr. Carson has eloquently said: "Not one of the spectators of that hour, though gifted with the eagle eye of prophecy, could have foreseen that out of that modest assembly of gentlemen, unheard of and unthought of among the tribunals of the earth, a court without a docket, without

a record, without a writ, of unknown and untried powers, and of undetermined jurisdiction, there would be developed in the space of a single century a court of which the ancient world could present no model and the modern boast no parallel; a court whose decrees woven like threads of gold into the priceless and imperishable fabric of our constitutional jurisprudence would bind in the bonds of love, liberty, and law, the members of our great Republic."

At the February Term, 1793, the celebrated case of *Chisholm v. Georgia*, an action of assumpsit, came up before the court. This case was instituted at the August Term, 1792, of the Supreme Court, which, under the Judiciary Act, had original jurisdiction in such cases, in virtue of Article 3, section 2 of the Federal Constitution. At that term the Attorney General moved that notice issue to the State of Georgia to enter an appearance, or show cause why judgment should not be entered and a writ of inquiry awarded. The court, "in order to give the State time for deliberation" and, I apprehend, themselves opportunity for study and careful thought, postponed the consideration of the motion to the next term, when it was argued by Randolph, the Attorney General, alone, counsel for Georgia filing a written protest against the jurisdiction and declining to argue the question.

The point in the case was, whether a State was amenable to the jurisdiction of the court at the suit of a citizen of another State. The first case, I believe, in which one of the States was sued in the courts of another State by a citizen, was instituted at the September Term, 1781, of the Court of Common Pleas at Philadelphia by one Nathan against the State of Virginia, and in it an attachment was issued and levied on a lot of clothing belonging to the State. The Virginia delegates in Congress, indignant at this affront, and protesting it to be *a violation of the law of Nations*, appealed to the Supreme Executive Council of Pennsylvania, which arbi-

trarily ordered the sheriff to release the goods.

In Chisholm's case, the court upheld the jurisdiction, Jay, Blair, Wilson, and Cushing, delivering opinions. Iredell dissented in quite a long argument, in which, voicing the sentiment of the Federalists, and true not only to the tenets of that party but to the profound convictions of his mind, he denied the jurisdiction. His opinion is a memorable one, and in my humble judgment, for clear and lucid reasoning, cold logic, strong argument and high statesmanship, was far superior to that of any of his colleagues. In it he virtually enunciated the doctrine that later on became so famous and prominent in the disputes and differences between the North and South under the name of "States Rights" or the "Sovereignty of the States." Marshall, the great expounder of the Constitution and the greatest jurist America ever produced, had boldly declared it in the Virginia convention of June, 1788. The decision of the court created a storm of excitement and discussion throughout the States. Two days after it was promulgated, the Eleventh Amendment to the Constitution, which declared that the jurisdiction of the Supreme Court should not extend to suits against a State by citizens of another State or subjects of a foreign State, was proposed in Congress, and afterwards passed by it, and adopted and ratified by all the States.

It was the custom at that time for all of the judges to deliver opinions in the important cases, and we find the volumes of Dallas enriched by the profound and exhaustive arguments of Iredell, notably in *Calder v. Bull*, *Penhallow v. Doane*, *Hylton v. United States*, *Ware v. Hylton*, and *Talbot v. Johnson*.

Always independent in thought and action, he never failed to dissent when the reasonings of his mind led him to differ with the majority of his brothers on the Bench, or to express his views, when, agreeing with them upon the general result, he arrived at the same conclusions by a different road. But

in all cases so strong, clear, and logical, were his opinions, that they always compelled attention and respect, even when they failed to persuade. Unquestionably he was the ablest constitutional lawyer upon that Bench until the advent of Marshall, and, in all other respects, the equal of Justice Wilson. While his labors upon the Supreme Bench were but light, those of the circuit were arduous and exhausting — his circuit at one time compelling him to travel 1,800 miles. He was a laborious and indefatigable student and writer, and while upon the Supreme Bench occupied his leisure moments in writing treatises, the publication of which were probably prevented by his untimely death. Among his manuscripts were found "A Treatise on Evidence," an "Essay on Pleading," and a paper on "The Doctrine of the Laws of England concerning Real Property in use or in force in North Carolina," the two latter of which were unfinished.

I cannot pass on without some slight mention of the correspondence of Iredell and the vast wealth of history bequeathed to us by it. To us the great wonder is, how the chief men of that day found the time to devote, to social correspondence, but men then, like men now, were always eager and striving for the news; and, in the lack of newspapers, it was disseminated and carried from one to another and passed on and on through the Colonies by means of letters. The man of that day who was no letter writer lived outside of the history of the times and heard no news. Iredell's letters were models, and numbering, as he did, among his correspondents the chiefest men of the day, hand down to us living pictures of the leading characters and stirring events of his life.

In the summer of 1799, his honorable life was nearly spent. The severe labors of the circuit, and the climatic influences of the sickly region in which he lived and travelled, had undermined his constitution and his health gave way. He was unable to attend the August Term of the Court, and, slowly

failing, at last died at Edenton on the 20th October, 1799, in the noon of life and the zenith of his glory.

The daily walk and life of Iredell from the boy of seventeen to the statesman and jurist of forty-eight, so vividly pictured to us by McRee, reads like an epic poem. The immature lad of seventeen, torn by stress of fortune from a gentle home and transplanted in a strange and wild land — springing in a day into the maturity of manhood — rising abruptly into the full radiance of public life — called in rapid succession from one high office to another, until he had exhausted

all, and filling all with equal roundness, until at the last, weary and worn, he sinks into rest followed by the love and respect of all.

In reviewing his life, I am at a loss which most to admire, his gentle dignity, his amiable disposition, his independence of thought and action, his sturdy self-reliance, his equipoise of mind, his high character, or his splendid abilities. Throughout the whole period of the Revolution, when North Carolina was in her most perilous strait, there is scarce a page of her history upon which the name of Iredell is not written.

MODERN INTERNATIONAL LAW PROBLEMS.

II.

FOREIGN DIVORCES.

THE question of foreign divorce enters into the field of international law at three different points — proceedings for bigamy, suits for dissolution of marriage, and disputes as to testate or intestate succession. An examination of the legal conceptions of divorce and of the effects of foreign divorces entertained in England and America will, however, throw sufficient light on the various problems to which it gives rise and the solutions that have been attempted or arrived at. It is scarcely necessary to premise that only marriages of a monogamous character are recognized as laying a basis for divorce. (In *re Bethel* (1888), 38 Ch. D. 220; and as to American law see 1 Bish. Mar. & D. § 3; and 50 N. W. Rep. (Neb.) 155, and 125 U. S. at p. 210.) Both in England and in America divorce is treated as a matter depending on domicile and not, as in certain foreign states, on the nationality of the husband. It is chiefly in connection

with the weight to be assigned to foreign divorces that the relationship of domicile to divorce has been worked out. In England the doctrine has had a curious history. The latest authority is the judgment of the Privy Council — delivered by Lord Watson, and well worthy of the reputation of that very great judge — in *Le Mesurier v. Le Mesurier*.

But before considering the present position of matters we must take a retrospect. At first the English courts were disposed to hold that an English marriage could not be dissolved by a foreign court, nor indeed otherwise than by a British statute. (*McCarthy v. Decaix* (1831), 2 Russ. & M. 614.) That view was overruled by the judgment of the House of Lords in *Shaw v. Gould* (1868), (L. R. 3 H. L. 85). The next position attempted to be supported was the inability of a foreign court to dissolve a marriage on any ground not recognized by English law. *Harvey v. Farne* (1883), (8 App. Cas. 43;

5 Rul. Cas. 703), gave a deathblow to that theory. Then came a curious current of *quasi* authorities to the effect that in addition to jurisdiction arising from the fact of the spouses having their domicile of succession within the territory, the general law of nations recognizes that a concurrent and equally effective jurisdiction to divorce is created by the spouses' residence within the territory of such permanence as to constitute what has been termed a "matrimonial domicile," although not of sufficient permanence to fix their true domicile there. As a typical instance we may take *Niboyet v. Niboyet* (L. R. 4 P. 1). A French man and an English woman were married at Gibraltar in 1856. In 1875 the husband went to Newcastle-on-Tyne, and continued to reside there till October, 1876, when his wife filed a petition in the divorce division of the High Court of Justice in England, alleging adultery, coupled with desertion for two years and upwards. It was admitted that the respondent, being in the consular service of France, had never lost his domicile of origin. The Judge Ordinary, Sir Robert Phillimore, held that he had had no jurisdiction to dissolve the marriage. On appeal Lords Justices James and Cotton reversed his decision (Lord Justice Brett dissenting). The main ground of the reversal was the opinion of the judges that before the English Divorce Act of 1857 became law the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights or for divorce *a mensa et thoro*, and in either case for proper alimony; and *consequently* that, after the act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. The fallacy of the argument obviously lay in the word *consequently*. Restitution of conjugal rights and divorce *a mensa et thoro* on the one hand, and dissolution of marriage on the other are totally different remedies, and it by no means follows that residence which will give jurisdiction as

to the former should also suffice for the latter.¹ Further evidence of the existence of the theory with which we are dealing will be found in the following cases: *Brodie v. Brodie* (2 Swa. & Tr. 557); *Shields v. Shields* (15 Court Sess. Cas. 2d Ser. 142); *Jack v. Jack* (24 Court Sess. Cas. 2d Ser. 467), where it was formulated by Lord President Inglis, then the Lord Justice Clerk of Scotland; and *Hume v. Hume* (ib. p. 1342), where the Scotch judges granted a decree of divorce for adultery to a wife whose husband had been in America for seventeen years, and was living with a woman whom he had married there. Side by side, however, with this stream of authorities there was a counter current, proclaiming the necessity of domicile as a foundation of divorce, *e.g.* *Manning v. Manning* (L. R. 2 P. & D. 233), in which the Judge Ordinary dismissed a petition of divorce at the instance of an Irish husband, upon the ground that he was not a *bona fide* resident in England. (*Wilson v. Wilson*, L. R. 2 P. & D. 435); and *Ritt v. Ritt* (4 Macq. App. Cas. 627), where the theory of domicile by mere permanence of residence only escaped condemnation by the House of Lords because it was abandoned in argument by counsel at the bar. These authorities created a sufficient impression among the exponents of the theory to reduce Lord President Inglis's description of it from the level of binding law in 1862 (*Jack v. Jack*, *ubi supra*) to that of matters of speculation in 1882 (*Stavert v. Stavert*, 9 Court Sess. Cas. 4th Ser. 529). Then came *Le Mesurier v. Le Mesurier*, an appeal to the Privy Council from the Supreme Court of Ceylon. The decision in this case is not technically binding on the English courts. But the tribunal which heard it, consisting of the Earl of Halsbury, Lord Watson, Lord Hobhouse, Lord Macnaghton, Lord Morris and Sir Richard Couch, was an exceptionally strong one, and it was in 1897 (*S— v.*

¹ Probably this distinction survives the *Le Mesurier* case. See *In re Tucker* (1897), (Prob. 83).

S——, Weekly Notes (1897), 20 (6)) noted with approval in the House of Lords. Mr. Le Mesurier, a member of the civil service of Ceylon, sued his wife for a divorce *a vinculo matrimonii* in the District Court of Matara, in that colony, on the ground of her alleged adultery with three co-respondents. The marriage had been solemnized in England, none of the parties were domiciled in England, and, except the wife, none of the parties were resident there. Important questions of colonial law, which are irrelevant for our present purpose, were raised by the appeal. But the chief point was whether the facts would give a court of divorce jurisdiction to pronounce a decree which would by the general law of nations possess extra-territorial authority. The Privy Council held that they would not do so.

The accepted doctrine must now be taken to be that no divorce is entitled to recognition in another state under the rules of international law, unless the court which pronounced the decree of divorce had jurisdiction over the spouses by reason of the *bona fide* and permanent domicil of the spouses in the country to which the court belonged. The reasons in favor of this rule are admirably summed up by Lord Watson in the *Le Mesurier* case (*ubi supra*, at pp. 538–541).

It only remains to be added that the proceedings in the foreign suit must have been in accordance with natural justice; thus the respondent must have proper notice of the suit and opportunity of defence (*Shaw v. A. G.* (1870), L. R. 2 P. & D. 156; *Collis v. Hector*, L. R. 19 Eq. 175); and the decree must be final and have been pronounced on the merits without fraud or collusion. (*Shaw v. Gould, ubi supra*; *Bonaparte v. Bonaparte* (1892), Prob. 402). But if these conditions are complied with, a foreign decree of divorce cannot be impeached in English courts for a mere error of procedure, even by third parties in collateral proceedings, although the error was such as to make the judgment of the foreign court bad by the law of the

country where it was pronounced. (*Pemberton v. Hughes* (1899), 68 L. J. Ch. 281).

It will be observed that the rule laid down in the *Le Mesurier* case deals only with the condition necessary to create jurisdiction from the standpoint of international law. Jurisdiction exercised under the municipal law, contrary to international, would possess municipal authority. (See *Green v. Green* (1893), Prob. p. 92). The question may yet arise in England in connection with decrees in India, where (*Thornton v. Thornton* (1886), 11 P. D. 176; *Warter v. Warter* (1890), 15 P. D. 152) residence creates divorce jurisdiction without domicil (Indian Divorce Act, 1869). *Semble*, in such a case, the decree would have no international effect. A colonial law prohibiting the marriage of the guilty party, so long as the other remains unmarried, does not operate as a bar to marriage in England, where the guilty party has acquired a domicil there (*Scott v. A. G.* (1886), 11 P. D. 126). The ground of the decision was that the incapacity to marry, being imposed only on the guilty party, was penal in character, and as such inoperative out of the jurisdiction under which it was inflicted (see *Ponsford v. Johnson*, 2 Blatch. 51); but the case is otherwise with regard to a prohibition imposed equally on both parties and constituting an integral part of the proceedings by which they are released from their incapacity to contract a fresh marriage, *e.g.* a rule that neither shall marry within six months of the final decree (*Warter v. Warter, ubi supra*), and as to penal prohibitions see *Huntington v. Attrill* (1893), App. Cas. 150). Generally it may be said that a foreign decree of divorce possessing international validity has the same effect on the legal position of the parties as it would have under the law of their domicil. (See further *Watts v. Shrimpton* (1855), 21 Beav. 97; *Shaw v. Gould, ubi supra*, as to succession to real property). The American law is fully discussed in 5 Rul. Cas. at p. 723, and 1 Bouvier, Law Dict. at p. 593.

The following points may be noted :

(1) The jurisdiction rests on domicile for international purposes. (2 Bish. Mar. & D. §§ 52, 53.) (2) But the wife may have a domicile apart from her husband's, and in such case either domicile is sufficient to found

jurisdiction. (*Ib.* § 55, n. 4), and see Pennoyer *v.* Neff, (95 U. S. 714); Watkins *v.* Watkins, (125 Indiana, 163; 21 Am. St. Rep. 217.) As to effect on position of parties see 128 N. Y. 263; 92 Tenn. 697.

—Lex.

THE ATTORNEY IN THE POETS.¹

I.

FOR an attorney to have but a share in vituperation at large was a fate too good for him; but Mr. William Woty put this right. Mr. William Woty's is not one of the most famous names in English literature; even the volumes of selections now pass him by unheeded. He lives, perhaps, only by a chance reference in Boswell, as part owner of a miscellany to which the great Doctor contributed. But in his day he must have been well known, for when his poetical works, in two volumes, were published in 1770, by subscription ("All hail! Subscription! 'Tis to thee we owe, The plenteous fruits, which from invention grow"), more than 550 copies had been subscribed, and the list included names still well remembered. Dr. Johnson himself, is there, and so are James Boswell, Esq., Mr. Garrick, George Coleman, Esq., Mr. Atterbury, Canon Seward, C. Phillips, and J. Phillips and Mrs. Harneck — perhaps the mother of the Jessamy bride. Now Mr. Woty misplaces no mercy in his judgment; the attorney is a pettifogger, and the pettifogger he proceeds, in a borrowed strain, to depict:—

THE PETTIFOGGER.

A PARODY WRITTEN IN WESTMINSTER HALL IN THE LONG VACATION.

The Courts are shut — departed ev'ry judge,
Each greedy lawyer gripes his double fee,
In doleful mood the suitors homeward trudge
And leave the hall to silence and to me.

¹ By E. V. B. Christian in "The Law Magazine and Review."

Now not a barrister attracts the sight,
And all the dome a solemn stillness holds,
Save at the entrance, where with all her might
The *quean* of apples at the porter scolds.

Save that at fives a group of wrangling boys
At intervals pursue the bounding ball,
Make *Henderson*,² the studious, damn their noise
When batt'ring the plaster from the wall.

From ev'ry court with ev'ry virtue crown'd,
Where many get and many lose their bread,
Elsewhere to squabble, puzzle and confound,
Attornies — clerks — and counsel — all are fled.

Contending fools, too stubborn to agree,
The good fat Client (name forever dear),
The long-drawn brief, and spirit-stirring fee,
No more, 'till Michaelmas, shall send them here.

* * * * *
Some ghost of Jefferies will this floor parade,
Some daring pettifogger, stern of brow,
Who might have done due honor to the spade,
Whirl'd the tough flail, or grasp'd the peaceful plough.

The upstart thing some useful trade to learn,
By far more suited to his shallow head.
Some trade, by which he might have known to earn,
With honest industry, his daily bread.

False pride forbade; nor to himself alone
Confines his views, but to his son extends;
Forbade the youth, to quirks already prone,
To mind the means, so he could gain the ends.

Forbade to bind him, prentice to a trade,
Behind a compter all the day to stand,
His birth by work mechanic to degrade,
Or wait on customers with cap in hand.

² An author and bookseller there.

Far from the worthy members of the law,
A rogue in grain, he ever kept aloof;
From learn'd bum-bailiff learn'd his briefs to draw,
And where he could not find, he coin'd a proof.

Yet doth this wretch, illiterate as proud,
With low-life homage, low-life bus'ness meet,
And pick the pockets of th' unhappy crowd,
Mur'd in the Compters, Newgate, and the Fleet.

Bound by their creditors in durance fast!
In plaintive murmurs they bewail their fate,
And many an eager, wistful eye they cast,
Whene'er the turnkey opes and shuts the gate.

For who to dull imprisonment a prey,
The pleasing thoughts of freedom e'er resigned,
From home, from wife, from children dragg'd away,
Nor cast one longing, lingering look behind.

Some sharp Attorney must the captive hire,
Who knows each secret winding of the laws,
Some previous fees th' attorney will require,
Before he ventures to conduct his cause.

For you, who traverse up and down this shrine,
And lounge, and saunter at your wonted rate,
If in some future chat with arch design,
Some wag should ask this pettifogger's fate

In sneering mood some brother quill may say,
"I've seen him oft at alehouse table sit,
Brushing with dirty hands the crumbs away,
And eye the mutton roasting on the spit.

"There in the snug warm corner of the bench
Part stain'd with grease, and part defil'd with beer,
His thirst with cooling porter would he quench,
And bend his noddle o'er the gazetteer.

"Hard by yon steps, now grinning as in scorn,
Mutt'ring his oaths and quibbles would he stand,
Now hanging down his pate, like one forlorn,
As if some dread commitment was at hand.

"One morn I miss'd him in this custom'd Hall,
And at the Oak,¹ where he was wont to be,
His clerk came down and answer'd to my call,
But by yon steps, nor at the Oak was he.

"The next I heard (oh melancholy tale!
On our profession what a foul reproach!
That he for forgery was confin'd in jail,
And dragg'd (oh shameful!) there without a coach."

¹ The Royal Oak, a public house near the Hall.

HIS CHARACTER.

Vulture, the arrant'st rascal upon earth,
At length is caught and into Newgate thrown.
Fair honesty disclaim'd him at his birth,
And villainy confess'd him for her own.

Grown old in sin, at no one crime dismay'd,
'Gainst Nature's cries he arm'd his callous heart;
For when his father was to death convey'd,
He growl'd — and damn'd the slowness of the cart.

Jack Ketch, to show his duty to his friend,
Will soon confirm it with the strongest tie,
But on such ties what mortal would depend.
A rogue he liv'd, and like a rogue he'll die.

Now prest with guilt, he feels its sharpest sting,
Great his transgressions, and but small his hope,
He gave the sheriff (all he had) a ring,
He gain'd from justice (all he fear'd) a rope.

No farther seek his vices to disclose,
But leave the culprit to his dark abode,
There let him rest, till breaking his repose
The hangman summons him to Tyburn road.

The attorney was dirty, illiterate, poor, a
rogue in grain; but to say this was not
enough. Mr. Woty felt so strongly on the
theme that he lavished upon it an illustration—the only one in the volume—and the
poem concludes with a rough drawing of the
gallows.

The last thirty years of the eighteenth
century are rich in references to the profes-
sion. This was, indeed, the period when
popular attention was first effectively directed
to its affairs. Earlier attempts at regulation
had been only partially and temporarily suc-
cessful, but the Act of 1734 had reduced the
body to small and manageable dimensions
and laid the foundation of modern rules af-
fecting the class. After nearly half a cen-
tury's experience of its work, further changes
were seen to be necessary. The better men
in the profession were petitioning Parliament
to take steps to exclude from it men unquali-
fied by lack of education or character. Of
external critics the judges were amongst the
most severe, and the attorneys, once the fav-
orites of the courts, now had little chance of

success there. The very highwaymen were like-minded, if one may trust a modern interpreter. "I had no more liking for Baverstock," says Mr. Marriott Watson's hero, Dick Ryder, ¹ "than I should spend upon an Attorney, save that he was a fellow of spirit." The poets, then, only followed a fashion when they wrote as did Mr. Woty. The full-blooded denunciation of attorneys by the gentleman who concealed himself under the name of "Expertus" doubtless represents fairly the general feeling. "The Lawyers," a poem, which has survived only in *The Muses' Mirror*² is set "to the tune of the Georgians."

Of all the professions on the Globe,
The coifed gown and scarlet robe
Most mis'ry do create ;
Instead of soothing down your cares,
They serve but to perplex affairs,
And bring them to debate.

Whether your cause be good or bad,
Whilst there is money to be had,
They'll still your suit maintain :
It is the bus'ness of their life
'Twixt greatest friends to stir up strife
Whose quarrels are their gain.

There are such quibbles and such quirks
Between attorneys and their clerks,
Their clients to confound :
That all their study, day and night,
Is to make wrong appear like right,
And ring the changes round.

Since lawyers are such common pests,
Avoid them as you would the nests
Of hornets nearly flown ;
And whilst you live, beware of law,
It is the hungry lion's paw
That tears the flesh from bone.

But hold, my muse, let's not run on
As if we never would have done,
But seek what to defend :
Oh, yes ! (in justice be it said)
They will (when all their fees are paid)
A reference recommend.

It is of interest to learn that the art of "smashing the lists," the practice of compelling litigants to compromise, or refer to arbitration, cases which it would be tedious to try, was known so long ago as 1778.

It is pleasant for the professional reader to turn aside from the main current of denunciation to an eddy of song where the attorney receives only good humored censure. This is in no less desirable a place than Goldsmith's "Retaliation." (1774.)

Mr. Hickey,—"an eminent Irish attorney," Professor Masson tells us,—is the capon of that excellent feast at which Garrick was the salad and Burke was "tongue with the garnish of brains." However eminent in his day, Mr. Hickey must be accounted fortunate in having acquired immortality in such goodly company. He was perhaps "a mere ordinary man," without pretensions to genius ; he wrote nothing save his briefs and cognovits, but he obtained by accident a wider fame than some more eminent contemporaries, because though not the rose he dwelt near it. His portrait stands at full length between those of Garrick and Reynolds.

Here Hickey reclines, a most blunt pleasant creature,
And slander itself must allow him good nature ;
He cherished his friend, and he relished a bumper ;
Yet one fault he had, and that one was a thumper.
Perhaps you may ask if the man was a miser ;
I answer, No, no ; for he always was wiser.
Too courteous, perhaps, or obligingly flat ?
His very worst foe can't accuse him of that.
Perhaps he confided in men as they go,
And so was too foolishly honest ? Ah no !
Then what was his failing ? come tell it, and burn ye,
It was — could he help it ? — a special Attorney.

The indictment is here perhaps less accurately expressed than in the other counts. To be a special attorney — to be appointed by a power of attorney to represent a friend — might happen to any man ; but to be a general attorney, an attorney-at-law, is a graver offence, and it was this of which Hickey was guilty. Little else is known

¹ *Gallop'ing Dick*, p. 174.

² Vol. I., p. 111 (A. D. 1778).

against him. Like all men who did not sufficiently revere Dr. Goldsmith, he incurred the displeasure of John Forster. Goldsmith's excursion to Paris in 1770, we are told, was not made more agreeable to Goldsmith by an unexpected addition to the party in the person of Mr. Hickey — whose habit of coarse raillery was apt to be indulged too freely at Goldsmith's expense.¹ But even Mr. Forster admits that once, at least, Mr. Hickey told the truth. "Goldsmith sturdily maintained that a certain distance from one of the fountains at Versailles was within reach of a leap, and tumbled into the water in his attempt to establish that position." With that story Mr. Hickey passes from our view. He was fortunate in his friend.

The name of another attorney who stirred the muse has been mercifully withheld. From *An Asylum for Fugitive Pieces*,² we learn that David Garrick, Esq., some years ago, had occasion to file a bill in the Court of Chancery against an attorney at Hampton, to set aside an agreement surreptitiously obtained for the purchase of a house there; and while the late Edmund Haskins, Esq., was preparing the draft of the bill, Mr. Garrick wrote him the following lines:—

TO HIS COUNSELLOR AND FRIEND, EDMUND HASKINS, ESQ., TOM FOOL SENDS GREETING.

On your care must depend the success of my suit;
The contest, I mean, 'bout the house in dispute,
Remember, my friend, an Attorney's my foe,
And the worst of his tribe, though the best are
so-so.

In law as in life, I know well 'tis a rule,
That a knave will be ever too hard for a fool;
To which rule one exception your client implores,
That a fool may for once turn a knave out of
doors.

One cannot be surprised at the vehemence of Garrick's detestation. For a litigant to dislike his opponent's attorney, at least as much as his opponent, is a common case; but when opponent and attorney are com-

bined in one person, one must look for a breach of the peace and may be well content to escape with an epigram. That he should think the attorney whom he sued "the worst of his tribe" was natural; that he should think the best but so-so was a little ungrateful to Sir John Hawkins, who had been at some pains to secure his admission to the Club, and even inspired Garrick's successful appeal to the Chancellor in this very matter. Garrick had happened to mention to Sir John the events by which he thought he saw himself deprived of opportunity to purchase a house he wanted, without hope or remedy. Sir John informed him of a similar case in which equity had interfered, looked up the report, and gave Garrick a note of it. This Garrick apparently mislaid, and on the eve of trial Sir John, again appealed to, obtained the volume containing the report, waited at the theatre and handed it to Garrick to give to his solicitor. And Garrick not only forgot in his rhymes what he owed to this friendly attorney, but omitted for months to let his friend know the result of the suit! But attorneys in the times of the Georges were a mark for all shafts. It is a little hard to see why; they were poor enough to be liked. Yet the Rev. Mr. Bramston in his *Art of Politics* notes with approval that,

Now wholesome laws young senators bring in,
'Gainst goals, attorneys, bribery and gin.

Dr. Johnson in the perils of the city he loved, noted that "here the fell attorney prowls for prey." Erskine declared to Boswell that he loved him "more than attorneys love by cheats to thrive." Churchill, writing ten years before Goldsmith devised his "Retaliation," congratulated Warburton, Bishop of Gloucester, on giving up thoughts of the law.

But you, my lord, renounced attorneyship
With better purpose and more noble aim,
And wisely played a more substantial game.

¹ The Life and Times of Oliver Goldsmith, II., 220.

² p. 65.

³ Hawkins' *Life of Johnson*, 2d Edition, p. 437.

THE MILITARY COMMISSION IN THE PHILIPPINE ISLANDS.

By LIEUT. M. A. HILDRETH, 1ST. N. D. U. S. V. JUDGE-ADVOCATE.

ON the 13th of August, 1898, Manila, the capital of the Philippines, was surrendered to the American authorities. Major General Merritt immediately placed the city under martial law; and in his proclamation guaranteed to the inhabitants, the protection of life, liberty and property.

At the time of the surrender, it was not known that hostilities had been suspended by the protocol executed by the two governments, but however, if known could have made little if any difference for, by the terms of the truce, the government of the United States was to occupy and hold "the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which should determine the control, disposition and government of the Philippines." There was, therefore, an obligation on the part of the government of the United States, to protect property and life, and for the purpose of punishing crime it became necessary to institute Courts within the domain of martial law. The Spanish Courts both civil and criminal had ceased to perform any of their functions. General Otis organized Provost Courts for the punishment of misdemeanors and petty offences. For the trial of felonies, a military commission was organized, of whose work this article is a brief history. It was appointed by virtue of the following order:

HEADQUARTERS DEPARTMENT OF THE PACIFIC AND EIGHTH ARMY CORPS.

MANILA, P. I. October 12th, 1898.

(*Extract.*)

4.—A Military Commission is appointed to meet at the headquarters of the Provost Marshal General, at 10 o'clock, A.M., Tuesday the 18th day of October, 1898, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

Detail for the Commission:

1. Colonel J. F. Smith, 1st California Volunteer Infantry.
2. Lieutenant Colonel C. M. Moses, 1st Colorado Volunteer Infantry.
3. Major J. M. Stotsenburg, 1st Nebraska Volunteer Infantry.
4. Major C. U. Gantenbein, 2d Oregon Volunteer Infantry.
5. Captain E. B. Pratt, 23d U. S. Infantry.
6. First Lieutenant L. P. Sanders, 1st Montana Volunteer Infantry. Second Lieutenant M. A. Hildreth, 1st North Dakota Volunteer Infantry, Judge-Advocate.

The Commission is authorized to sit at such other places as may be designated by the Provost Marshal General as convenient for the dispatch of business and without regard to hours.

* * * * *

By COMMAND OF MAJOR GENERAL OTIS:

THOMAS H. BARRY,
Assistant Adjutant General.

The commission was composed of some of the best legal material in the Eighth Army Corps. At its head was Colonel James F. Smith of the 1st California, U. S. V., a fine officer, an able lawyer and member of the Bar of San Francisco, and a most excellent man. He presided over the sessions of the Commission with a dignity and urbanity which would have done credit to an English Chancellor. His services in the Philippines have been greatly appreciated, for he was made a Brigadier General, and, later, Military Governor of the Island of Negros, where he has continued to merit the approbation of General Otis, as well as to have won the respect and confidence of the inhabitants of the territory.

Lieutenant Colonel Moses of the 1st Colorado, U. S. V., was a man of excellent judgment. Though not of legal training, he

possessed the most valuable attribute of judicial knowledge,—the power to see both sides of a question at the same time.

Major Stotsenburg of the 1st Nebraska, U. S. V., was a graduate at West Point of the class of 1877; a post-graduate at Fort Leavenworth. Promoted to the Colonelcy of his regiment, he fell at the head of his brave soldiers, April 23, 1899, at Quinguay, Luzon, with these words which were a fair index of the man, "Push on, never mind me." He was an officer of merit; dignified, courteous and brave.

Major C. U. Gantenbein of the 2d Oregon, U. S. V., was the Lord Mansfield of the commission. He possesses a fine judicial temperament, a thorough knowledge of the law, and made a most excellent member. He has recently been greatly honored by having been appointed by the governor of his state, Adjutant General.

Captain Pratt of the 23d United States Infantry, was another regular army officer who added much to the dignity of the commission in his thorough knowledge of military procedure.

The junior member of the commission was Captain Sanders of the 1st Montana, U. S. V., a graduate of Harvard Law school, who was prevented much against his wishes from seeing active service on the firing line by reason of his assignment as aid upon the staff of General Otis.

The commission commenced its labors in the early part of October, and were in almost continuous session down to the time of the Filipino outbreak in February, and proceeded to try many cases, including murder, rape, conspiracy, and embezzlement in violation of the laws of war, and seditious libel. As General Otis well says in his report to the Adjutant General of the Army, "This period was one of plotting in the interests of the insurgent cause, and men of every nationality appeared to be engaged in questionable enterprises promising individual gain."

In all of these cases, the accused were

given the opportunity to prepare their respective defences, permitted to have American lawyers, officers from the army, detailed as their counsel, who in every instance most loyally and ably defended their clients, and discharged their irksome duties with a faithfulness and zeal which is ever characteristic of the American Bar.

The accused produced their witnesses, and cross-examined those on the part of the prosecution. In fact the entire conduct of these trials partook largely of the procedure in our own Courts of Justice.

The proceedings were novel to the many inhabitants of Manila. Crowds of Filipinos, Spanish mestizos, and Chinese, thronged the rooms of the Intendencia where the commission held its sessions, to witness these trials. The dignified body of officers listening patiently to the testimony,—the intensity of a Spanish witness who was determined to tell the truth, lent an interest to the scene which impressed upon those who were present that justice was being administered along different lines than those to which they were formerly accustomed.

One of the most important cases that was tried by the commission was that of three Spanish officers upon the following charges: Conspiracy in violation of the laws of war; embezzlement in violation of the laws of war. These officials had charge of the public prison in Manila. One of them was known as the Inspector of Prisons; the other as Captain of Prisons, and the third was the Adjutant. Their trial commenced on the 22d of November and lasted for a period of twenty-six days. The result had a beneficial effect upon the community at large. One of them was acquitted; two convicted and fined \$2,500 in gold each and sentenced to imprisonment at hard labor for three years, which term was subsequently reduced to six months.

When the United States took possession of the public buildings of the city of Manila, they left in charge of them, many Spanish

military officials. The three accused in charge of the Presidio de Manila had in their hands on the 13th day of August, \$21,000 of Mexican currency. The articles of capitulation provided "that all public funds should be turned over to the United States as captured property." By a system which was unique in many of its plans, the three officials proceeded to make way with the \$21,000 in a manner which, as developed by the evidence, threw much light on why Spain is a bankrupt nation. The evidence disclosed amongst other things that on the morning of the 13th of August, the three officials had concluded that the money which was at the prison was too much to be left to the Americans, and too great to be returned to Spain, consequently they proceeded to make a division of it. Their method of showing that this large fund had been absorbed was first by raising bills that were presented for supplies furnished the inmates of the prison. A Chinaman who had done business for these officials for years testified that he had received a bill for fifteen hundred cavans of rice, when in truth he had furnished only one hundred and fifty cavans. He said his contract required him to sign all bills, whether right or wrong, presented by the Adjutant.

The inmates of the prison were mustered for clothing. It was estimated that \$4,500 were needed to properly clothe the convicts and put them in decent appearance for the American authorities. Consequently a bill purporting to be signed by a Chinese merchant for \$4,500 worth of clothing was prepared, allowed, properly audited and paid. The Chinaman testified he had never owned \$400 worth of clothing in his life. When a convict was discharged from the prison, he was allowed a small sum as a starter again in life. It appeared that there were the names of over two hundred people on this roll who had been allowed this starter, many of whom were long since dead, and that all bills were raised though not a dollar's worth

of supplies were furnished to the prison. Here was forgery on a large scale.

Each of the accused went upon the stand and testified in his own behalf. Jose Ruiz who was a nephew of a former Minister of War of Spain, admitted that the item of \$4,500 was divided amongst all three, but denied any further complicity in the crime. The theory of the defence raised a nice question of law. They maintained that the United States government never became the owners of the property in question. That the terms of the Protocol simply provided that the United States should hold possession of Manila, and the title to the money never passed to this government. Therefore, all evidence on the part of the three officials was directed to establishing from a general denial of guilt, that everything they did, even though criminal, was not subject to any action on the part of the American authorities, because the United States had no right to the property in question.

Fairly stated their defense was, that while they might have committed a crime against the government of Spain, they had not committed any act over which the United States had any right to proceed. Major Fraine of the 1st North Dakota, U. S. V., Captain Eager of the 1st Nebraska, U. S. V., Lieutenant West of the 1st California, U. S. V., and Captain Chavarre of the Spanish army, who appeared as counsel for the prisoners, argued with great zeal in support of these contentions. The commission, however, took the view: First, that the accused held the money in trust; second, that the title passed to the United States by virtue of the articles of capitulation; third, that they violated the common law of war in agreeing to steal the money in question, and having stolen it, were guilty of embezzlement.

The conviction of Zoreta by the commission excited much feeling amongst the citizens and residents of Manila. Strong pressure was brought to bear upon General Otis to set aside the findings of the commission

and to liberate him. Innumerable petitions were signed headed by the Archbishop of Manila praying for his release as his term of imprisonment had nearly expired. Upon the payment of his fine of \$2,500 in gold, he was discharged and soon sailed for Spain. Ruiz still remains in confinement. It is said that he prefers to stay in Manila rather than go back and face a Spanish court martial.

The trial of the Spanish newspaper editor, Antonio Hidalgo, for seditious libel in violation of the laws of war, was an exceedingly important case. The accused published many articles reflecting upon the American authorities and upon General Otis's management of matters in the Islands. He was defended by Captain Eager of the 1st Nebraska, U. S. V., an officer of merit, and a lawyer of marked ability who rose to the rank of Lieutenant Colonel before he was mustered out of the service. He made a most eloquent defense for the accused, who was found guilty, sentenced to pay a fine of \$500 in gold coin of the United States;—"that he be placed and kept outside of the lines of the territory now occupied by and within and under the jurisdiction of the military forces of the United States, and that the press, type, furniture, material, and all appurtenances of the printing office of La Voz Espanola be confiscated and sold for the use and benefit of the United States." General Otis upon a petition that was signed by the foreign consuls and leading residents of Manila, mitigated the sentence so much as related to confiscation of property and to the deportation beyond the lines occupied by the military forces of the United States. The fine was reduced to \$250. It was subsequently paid and Hidalgo was released. The newspapers stopped their abuse which at the time was coarse and vulgar, and reflected severely on General Otis's course which any impartial person is bound to acknowledge has been one of ability and wise administration.

The trial of the cases was a novel scene

not only to the inhabitants, but to the Spanish lawyers, judges and clergy, most of whom knew little or nothing of the methods of American courts or the administration of justice in accordance with our procedure. The commission was pre-eminently judicial. On doubtful questions they invariably ruled in favor of the accused. On one occasion the commission refused to follow the Common Law rule that upon the trial of the husband, the wife could not be a witness either for or against him. They held that inasmuch as the rule had been abrogated in most States of the Union, and that as the Philippines were nearer California which was a Code state and would no doubt form a part of that judicial district, that they would overrule the objection of the Judge Advocate and permit the accused to testify. This decision and a subsequent acquittal of Amerych gave the Spaniards great confidence in the impartiality and integrity of the commission.

Many persons are of the opinion that the exercise of martial law is a species of government little short of tyranny. This is not true. Martial law has its limits. As was well said by Mr. Justice Blackburn in his famous charge in the Jamaica case, "Although martial law dispenses with the forms and delays which appertain to the ordinary criminal jurisprudence, it does not, therefore, authorize or sanction every deed assumed to be done in its name. It stops far short of that. For if it did not, lawless men, under color of and putting forward the pretence of authority, might commit acts abhorrent to every principle of humanity. They might gratify malice and revenge, hatred and ill-will, lust and rapacity. They might perpetrate deeds from which the sun would hide its face. *No greater error exists than to suppose that the subjecting of a district to the military power authorizes excess on the part of those who administer that power.*"

All the records and proceedings in these various cases have been preserved, filed in the office of the Judge Advocate General at

Washington where they undoubtedly will form a portion at least of the internal history of Manila and of the Philippine Islands.

The military commission as a war court is very old, and is well known to the historian. Major André was tried by a military commission composed of fourteen officers of the army, of which General Nathaniel Greene was the President. Jackson made use of them when he was fighting the Indians in Florida. Scott found them a valuable adjunct while governing and controlling Mexico. During the great rebellion, hundreds of cases were tried by these tribunals and the decisions of our highest courts became involved. But now it is very well settled, First, That a military commission is a tribunal which rests upon, is governed by, and derives its power and authority from martial law. (*Dynes v. Hoover*, 61 U. S. (15 L. ed.) 843; *Ex parte Vallandigham*, 1 Wall. 243.)

Second, a military commission has jurisdiction upon the theater of actual war. It rests fundamentally upon the fact that martial law has been declared, and there can be no martial law except such as may arise from civil war, foreign invasion, or the theater of actual military operation, when war actually prevails, as when there is no power left but the military power, and civil courts and instrumentalities for administering justice are closed. Such was the decision in the Supreme Court of the United States in the great case of *Ex parte Milligan* (Book 18, L. ed. 281). This case forms a valuable precedent as it clearly draws the line as to when martial law begins and ends. It settled for all time to come the right of trial by jury, and struck a blow at the unlawful use and abuse of military commissions where courts were open and the necessity for martial law did not exist.

THE DISCOVERY OF THE PANDECTS.

THE revival of the study of the civil law of Rome towards the beginning of the twelfth century is, without question, one of the most memorable circumstances in the history of modern Europe. Throughout a very considerable portion of Europe, the civil law was admitted as of direct authority; and even in those countries where it was made subservient to the existing national legislation, it was appealed to generally as a guide, if not as a rule, in cases for which the municipal laws had made no provision. There is, perhaps, no circumstance connected with the renovation of the civil law more remarkable than the rapidity with which it was adopted, and as it were, became naturalized, among the very nations where it had for some centuries past been gradually falling into comparative disuse and oblivion.

During the long period of darkness and barbarism which had succeeded the subver-

sion of the Roman empire, the most valuable and authentic monuments of its jurisprudence had disappeared. Fragments of the Roman legislation were indeed extant, and in some instances obtained the force of law; in many more preserved the authority of custom. The Burgundians, the Goths, and the Visigoths, on establishing themselves in the South of Europe, had retained a portion of the laws and institutions previously in use among such of the imperial possessions as they had subjugated. The compilations known by the titles of *Breviarium Aniani* and *Liber Responsorum Papiniani*, both published at the beginning of the sixth century (the former, as it is supposed, by order of Gundebald, King of the Burgundians; the latter by that of Alaric, King of the Visigoths), are ascertained to have been in great part made up of extracts from the codes of Gregorius and Hermogenes, and Theodosius,

mingled with such scraps of the works of certain celebrated Roman juriconsults as these barbarian lawgivers had the means or the judgment to incorporate with them, and adapted to the alterations already effected in the government, and institutions of the vanquished countries. The edict of Theodoric also, which was published about the same time, retained many traces, though by no means so strong or so definite as the *Breviarium*, of the Roman jurisprudence. But since the period when these rude medleys of legislation had been first promulgated, the doctrines of the feudal system had attained such a luxuriant growth as, in great measure, to choke up or eradicate whatever principles or institutions may have been transplanted from the ancient laws of Rome.

It has sometimes been hastily and inconsiderately advanced, that all the traces of the civil law had absolutely disappeared, after the general irruption of the barbarians into the Roman territory. But this opinion is refuted by the best historical testimony. The Roman law, incorporated and amalgamated with that of the German nations, probably maintained its influence as prescriptive custom, after its immediate authority, as derived from the codes of Alaric and the other barbarian legislators, had ceased to be either respected or acknowledged. Some shocks it undoubtedly received from the feudal system; and, indeed, it is sufficiently evident that, in those cases where one was found incompatible with the other, the ancient law must have been forced to give way; but (except in the West Gothic empire, where it was expressly annulled) its general validity was never directly impugned. That some portion of it, therefore, and probably a very considerable one, sunk into desuetude, is a fact to be attributed solely to the gradual innovations introduced by other systems, and to the effects of time, which in these unlettered ages, often consigned mere acts of positive legislation to rapid and premature neglect.

If it could be admitted that the civil law

of Rome had fallen into complete disuse before the beginning of the twelfth century, it would follow almost as a necessary consequence that the study of it must have been altogether laid aside; and accordingly those who believe in the absolute extinction of the Roman jurisprudence can have no difficulty in giving credit to the accounts which represent it as wholly unknown to the learned, until the discovery of the *Pandects* of Justinian. But independent of the fact that the authority of the Roman law was never wholly invalidated, and of the inference which may thence be drawn that the study of it was never wholly neglected, there is very satisfactory evidence to disprove such a supposition. In Savigny's learned and elaborate history of the Roman law during the Middle Ages, several testimonies are collected, which show that the study was prosecuted in different schools of Western Europe, in England as well as elsewhere, and, among other places, at York, between the seventh and eleventh centuries. There are also traces to be found of a school at law which existed at Ravenna in the eleventh century, and which Savigny not only conjectures to have been the same establishment afterwards so celebrated at Bologna, but to be identical with the law school organized by Justinian at Rome, whence, indeed, a writer of the thirteenth century named *Odofredus* expressly declares it to have been transferred. But, however this may be, it is very certain that for some time previous to the epoch when the *Pandects* are supposed to have been brought to light, the University of Bologna had boasted its professors of civil law. One *Pepo*, of whom little is known but the name, is said to have delivered his lectures there towards the beginning of the twelfth century; and his successor or contemporary, the celebrated *Irnerius*, who has been honored with the epithets of "*illuminator et lucerna juris*," is known to have attracted thither a considerable number of students at least as early as the year 1125. The canonists also

of the same period availed themselves of the writings of the ancient civilians ; and the *Decretum Canonum*, compiled by Ivo of Chartres, which is the earliest work of importance extant on the subject of canon law, makes specific mention of the remodelled system of Justinian ; and even in the preceding century the attention of the learned had been particularly directed to his compilations by the publication of the work entitled "*Petri Exceptiones Legum Romanorum*," which is entirely made up of extracts from them. The discovery of the Pandects, therefore, was rather the effect than the cause of the revival of the study of civil law.

This memorable event is supposed to have taken place about the year 1135. That the Pandects were partially known before this period is a fact perfectly well authenticated ; but there is no reason to doubt that the particular copy which was the means of bringing the work into general notice was first discovered, or rather that the discovery of it was first made public, some time in the early part of the twelfth century. There is not so much dispute concerning the period, as about the manner in which the work was brought to light. This, indeed, has given rise to much controversy. According to the popular story, the precious manuscript was found by the soldiers of Lothaire the Second, at the sacking of the town of Amalfi, and, being rescued by them from the spoil, it was afterwards bestowed on the citizens of Pisa, as a reward for the assistance they had afforded to the besiegers. It is to be remarked, however, that the contemporary chroniclers, who have recorded the siege of Amalfi, make no mention whatever of the finding of a manuscript ; and, indeed, that the whole account appears, for the first time, in the work of a Pisan poet, who wrote fully two hundred years after the event. Thus it is evident that the testimony on which the story rests, if this be entitled at all to the name of testimony, is of the very weakest description. On the ground of probability, its support is still more slight. For

it can scarcely be credited that, amidst the plunder of a captured town, a barbarous and illiterate soldiery should have carefully preserved from among the spoils what to them must have been nothing more than a mere bundle of parchment. It certainly is by no means improbable that the copy of the Pandects may have been brought to Pisa from Amalfi, since we know that the latter town, as well as the former, kept up some commercial intercourse with the East, whence, doubtless, the manuscript was originally imported ; but this must have happened before the siege. The more feasible supposition, however, appears to be that it was brought direct from Constantinople or elsewhere, and that it remained for some time, perhaps for centuries, forgotten there, until the reawakened interest and the more general knowledge diffused by Irnerius and his disciples led to its discovery.

The parchment on which it is written is of a peculiarly even texture and color ; circumstances that have occasioned the loss of the most precious relics of the wisdom of antiquity, since it was the common practice of those ignorant and barbarous ages to obliterate the characters thus transcribed, in order that the cleansed skin might receive the impression of some monkish legend or bulky treatise of scholastic divinity. Within comparatively recent years, Cicero's treatise, *De Republica*, some of the books of Livy, and other classical works, supposed to be lost beyond recovery, have been found lurking under certain barbarous productions of the Middle Ages which had been written on the same parchment ; and these *codices palimpsesti*, as they are called, have within the present century furnished to our very imperfect collection of the works of the ancient lawyers the addition of the invaluable institutes of Gaius, besides some fragments of lesser note. Many of the works we now possess had remained for years, possibly ages, neglected and forgotten among the voluminous parchments of convents and monasteries, simply because

the owners of them were ignorant of their value. Soon after the study of the civil law had, however, been resumed in Italy, several ancient treatises connected with it were brought to light, not always as newly discovered treasures, but as treasures of which the real worth had been then, for the first time, ascertained.

When it is considered that the original works from which the materials of this compilation are for the most part lost, and that such as have been in some degree preserved, consist only of imperfect and disjointed fragments, the digest cannot fail to be viewed as a truly invaluable treasure, and the discovery of it as the most memorable event in the history of modern jurisprudence. This accounts for the almost superstitious veneration in which the original copy, supposed to have been found at Amalfi, was invariably held. After the siege and capture of Pisa in 1406, it was transmitted to Florence, where it has ever since been preserved. It was formerly kept, not in the usual depository for works of literature, but amongst the most choice jewels and treasures of the Grand Dukes of Tuscany; and never submitted to the inspection of the curious, but in the presence of the chief magistrate of the city, accompanied by a procession of monks bearing torches, who all stood uncovered before it with the same reverence as if it had been an object of religious worship. A special permission from the Grand Duke was long necessary in order to obtain a sight of it; and even now that it has been removed to the Lorenzo-Medicean library, it can only be beheld by casual visitors through the glass case in which it is carefully treasured.

Independently of the peculiar circumstances which originally gave to this particu-

lar copy of the Pandects an importance greater than it possessed, it unquestionably remains to this day the most valuable existing document connected with the civil law. Numerous faults, occasioned by the ignorance or negligence of the copyist, have been detected in it; but its antiquity and its general correctness must, nevertheless, always entitle it to claim a greater degree of authority than any other of the editions of the same work, which, indeed, have probably all been directly or indirectly transcribed from it. In all cases of disputed text, the Florentine manuscript has been invariably appealed to for decision; and some of the learned have not hesitated to account it one of the most memorable and fortunate events of their life that it has been their lot to catch even a hasty glimpse of it. The most illustrious civilian of the sixteenth century, Cujacius, offered to furnish a deposit of 2,000 crowns of gold (a sum equivalent to £1,200 of our money), together with the security of the Duke of Savoy, in order to obtain the loan of it during a few months; and, it is said, that to the end of his life he constantly regretted the failure of this application, which Cosmo the First is supposed to have refused, partly in the hope that so celebrated a lawyer might thereby be induced to fix his residence at Florence.

Although the discovery of the Pandects has incorrectly been represented as the original cause which first occasioned the revival of the study of Roman law, yet there can be little doubt that it lent a new and powerful impulse to the ardor of such as had already begun to cultivate an acquaintance with it; and even induced many to embark in the same pursuit, who, without this stimulus, might never have devoted themselves to it.

—*The Law Times.*

THE SUPREME COURT OF WEST VIRGINIA.

I.

BY J. W. VANDERVORT OF THE WEST VIRGINIA BAR.

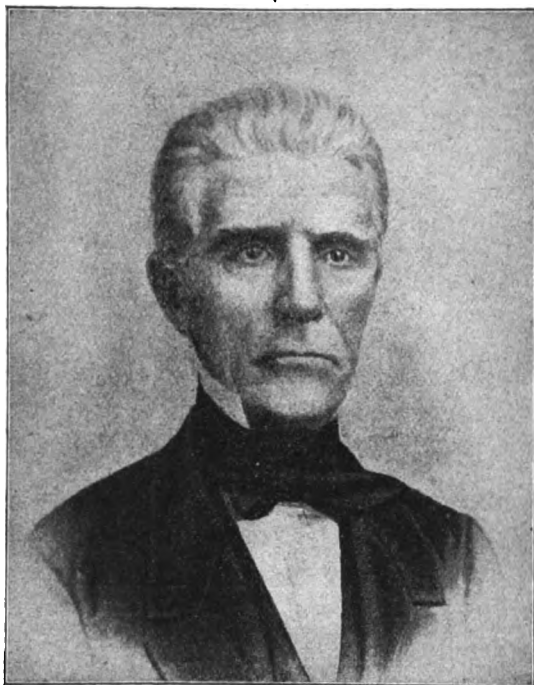
WEST Virginia was formed from the State of Virginia, June 20, 1863. It thus became a State in the midst of war, and its formation was a protest against the Rebellion by the loyal people of Virginia, west of the Allegheny Mountains, where the greater part of the State of West Virginia lies. Its earlier judges were sternly and strictly loyal to the Union.

As in Virginia, the common law, except in so far as modified by statute, has been in force from the formation of the State. Its judicial system embraces justices of the peace with limited civil and criminal jurisdiction; circuit courts, each circuit embracing one or more counties; and the Supreme Court of Appeals. The law and equity jurisdictions are preserved separate and distinct from each other, by separate proceedings, but are administered by the same court and the same judge. What is known as "code practice," has never found congenial soil or climate in either of the Virginias.

The great natural resources of our State, coal, timber, iron and oil, are now being more largely developed than ever before; our Su-

preme Court to-day in settling questions of great interest, at the same time determines property rights involving thousands, even hundreds of thousands of dollars in single cases, and yet the salary of a judge of the Supreme Court in our State is only \$2,200, and yet in

spite of this fact it is not too much to say that our judges give the greatest service for the least pay, and in no wise neglect their duties by reason of the paucity of their pay. The constitution of the State limits the salary, and it is the hope of the bar that the salaries of the judiciary of West Virginia, including the circuit judges, who only receive \$1,800 a year, will soon be increased. Never, so far as I know, has suspicion ever pointed a finger of doubt at the honor of our state judi-



WILLIAM A. HARRISON.

ary, and never have our people believed of any of its judges that of him it could be said that "The jingle of the guinea helps the hurt that guilty honor feels."

Our Supreme Court consists of four judges. The reports of the Supreme Court decisions now consist of forty-five volumes. In preparing the sketches of the judges of the Supreme Court, I am indebted to many per-

sons and sources for my information and claim but little credit for originality, but assume all blame myself for mistakes.

The first Supreme Court of the State consisted of the following judges: James H. Brown; Wm. A. Harrison; Edwin Maxwell, and Ralph L. Berkshire.

William A. Harrison was the son of Matthew Harrison, a merchant and inspector of tobacco at Dunmfries, Prince William County, Virginia.

He was born at the latter place the 27th of August, 1795. His family was among the early settlers of Virginia, an ancestor, Burr Harrison, having come from England to the young colony about 1660. He was married in 1823 to Miss Anna Mayburry. She was the granddaughter of Valentine Eckert, a Pennsylvanian distinguished in Revolutionary times, and one of the earliest judges to sit upon the bench after the formation of the United States gov-

ernment, having been made judge in 1784 of the court of common pleas of Berks County, Pennsylvania, and continuing in office for seven years.

Judge Harrison's home near Clarksburg was noted for its generous hospitality, and there he reared a large family of boys and girls. He was a tall and handsome man of dignified and commanding appearance, and at the same time, gracious in manner. He died at Clarksburg, December 31, 1870.

He was largely acquainted with distin-

guished lawyers and politicians of his day. Judge Harrison resided in Clarksburg, Harrison County, Virginia, from 1821 until the time of his death.

In 1823 he was assistant United States District Attorney and attended the court in Wythe County, going to and fro on horseback.

His practice was one of immense labor, and to it he gave great research and profound

thought. While never a politician he was a constant adherent of the Whig party, and his intercourse with his fellow-men was marked with a dignified bearing and manner, courteous to all. He was an eloquent advocate, a sound reasoner, an honest man, and adorned the profession, both the bench and bar, by his eminent qualities of head and heart.

He was a member of the Presbyterian Church and lived a consistent Christian.

He was for three sessions a member of the Virginia Assembly, and subsequently he became District Attorney for the western district of Virginia.

When excitement arose incident to the Rebellion he showed a firm adherence to the Union and took an active part in the public meetings which resulted in the reorganized government of Virginia at Wheeling. He was a member of the Governor's Council and rendered material aid by his knowledge of the law and his sound judgment and wise councils.



RALPH L. BERKSHIRE.

In 1861 he was elected to a vacancy on the circuit bench, which position he retained until he was elected a member of the Supreme Court.

Below are copies of two letters written by him sixty and seventy years ago to members of his family describing his visits to two of the presidents, Jackson and Van Buren.

WASHINGTON, June 11, 1829.

DEAR A——

I left Winchester Monday morning 1 o'clock on the stage via Shepherdstown, Boomborough and Fredericktown, the latter of which is surrounded by the most beautiful country I ever saw. Tarried in Fred' from 11 o'clock till two, dined at Talbots — I am staying at present at the National Hotel, the most splendid house in the U. States. Col. Hunter called upon me this morning and carried me up to see Gen'l Jackson. Hunter is a warm personal friend of Maj. Donaldson (private secretary to the president) and among the very few

political friends of the Gen'l here. I was first introduced to Maj. Donaldson as the relation of Hunter and friend of the administration. Maj. Donaldson asked if I desired an introduction to the Gen'l. I replied that I did. I handed him my letters of introduction as is the custom, he read them over, arose with a smile and a pleasant eye upon me, saying, "the Gen'l will be pleased to see you — Sit a moment sir." He stepped out a few minutes returned and said "the Gen'l is now at leisure," we walked into the audience room & I was introduced to a very old plain man, he has much the appearance of

infirmity and age. Shook me cordially by the hand and observed "I am happy to see you sir." After some conversation I returned to Maj. Donaldson's office to get my hat, when he enquired where I put up and upon receiving my answer he said he would try to call and see me if he could find time. We parted. I am much pleased with Maj. Donaldson, he is a very handsome man about 25 years old from appearance, frank and said to be very amiable. The Gen'l is the most *iron-faced* old fellow I ever saw,

plain and simple in his manner yet dignified in his conversation. The day after to-morrow I am to be introduced to the Secretary of State and other heads of departments. I wish I could convey to you a glass of the delightful soda water drank here. Believe me, &c.

W. A. H.



EDWIN MAXWELL.

WASHINGTON,
June 10th, 1837.

MY DEAR A——

I arrived here on Thursday night very much fatigued indeed by night travel. Yesterday I called to see Mr. Campbell the treasurer of the United States and brother of our Governor; after

chatting an hour with him, he proposed a call to see the President, we did so at 11 o'clock, left him at half past 11, under an invitation to return and dine with him at four. We did so, partook of what he called a family dinner which at any other place would have been called a feast. Whilst enjoying his fine desert I wished I could convey to you some of his fine straw berries and cream & sundry other nice things. We used for desert gold knives and forks, pretty things for democrats to eat with. He has two sons living with him; one appears to be sprightly the other dull, both young, he and his two sons

are the only occupants of the great castle, save his numerous servants all of whom are white. In the course of an hour I shall ride out and eat a family dinner with our kinsman Gen'l Hunter & tonight go aboard the steamboat and reach Richmond tomorrow at 4 o'clock P. M. I have met with several members on the way down. I did not come through Balto. when I arrived within 9 miles of that place, I met the cars drawn by horses on a railroad from Baltimore to Washington, coming up to Washington & transhipped into them.

Yours truly,
WM. A. HARRISON.

Ralph L. Berkshire was born in Bedford County, Pennsylvania, April 8, 1816; from that point he removed with his father William Berkshire, a farmer, in the following year to Monongalia County, Virginia. Until a young man he resided with his father on a farm and then learned the trade of carpenter, and after completing his trade he was employed for some years in this business. When of age he began the study of law with Guy R. C. Allen one of the eminent lawyers of his day. On his admission to the bar he soon became prosecuting attorney of Monongalia County, but was never ambitious for political honors and never occupied any other public position until he became judge, first of the circuit court and of the Supreme Court in 1863.

He took an active part in the formation of the State of West Virginia, was a member of the Wheeling Convention, and his loyalty and fidelity to the union made him one of the mainstays of the loyal party in the early days of the State. Judge Berkshire, except the time he has been on the bench, has been actively engaged in the practice of law. For many years he was a partner of Honorable Geo. C. Sturgiss and although now more than eighty years of age is still engaged in the practice, but only giving to it such devotion and attention as is congenial to his declining years.

Judge Berkshire is tall and dignified in

appearance, and although now somewhat drooping with the weight of years, yet his mind is bright and active and his manner, as it has always been, as gentle as that of a child. I shall long remember the extremely courteous treatment he ever extended to me when a student of the West Virginia University.

He also is and has long been a leading member of the Presbyterian Church.

Edwin Maxwell was born in Lewis County, Virginia, in 1834. He was raised on a farm and his opportunities for an education were limited. He was, however, studious and industrious and began the practice of the law in 1852.

In 1857 he formed a partnership with Colonel Burton Despard in Clarksburg, at which place he has ever since resided. In 1867, Judge Nathan Goff became a member of the firm. This partnership continued until in 1867, when Mr. Maxwell was elected a member of the Supreme Court. From 1863 to 1866, he was a member of the State Senate, was chairman of the judiciary committee, and had much to do in shaping the early legislation of the State. In 1866 he was Attorney General for West Virginia. In 1884 he was the candidate of the Republican party in a fusion with the Greenback-Labor parties for Governor of the State, but was defeated. In 1888 he was also a member of the State Senate and chairman of the judiciary committee. Judge Maxwell still practices his profession in which he has been successful. He has largely devoted his attention to equity practice and is a profound lawyer, and during his whole life his character has been beyond reproach.

James H. Brown is of English ancestry; is a native of Virginia; is the son of Mr. Benjamin Brown, a native of the same State. He was born in Cabell County, December 25, 1818. His mother was a native of North Carolina and the daughter of Major Nathaniel Scales.

He attended Marietta College, Ohio, and

also Augusta College, Kentucky, where he graduated in 1840. In person he is large, of a rather rough exterior, but with a pleasant manner. He is fluent in speech, logical in thought. He is firm and determined in purpose. In faith he is a Presbyterian, and has long been an elder in that church. He began the practice of law in his native county in 1843, and later it extended to other parts of the State. In 1844 he married Miss Louisa Beuhring. His son, James F. Brown, is now one of the leading lawyers of the State.

Judge Brown took an active part in the formation of the State, was faithful to the Union and the Constitution, was a member of most of the conventions looking to the formation of the State, was elected a member of the Legislature of Virginia on the 23d of May, 1861, from the County of Kanawha, in the midst of turmoil in a divided country, — he attended many meetings when his hearers were armed for protection.

He was eloquent on the stump and fearless in defending his political faith. He was a member of the Convention that framed the first State Constitution, and a delegate to the Convention at Parkersburg that nominated Jno. S. Carlisle for Congress.

In the winter of 1861–1862 he was elected and commissioned judge of the 18th judicial circuit of Virginia. While acting in this capacity the records of his courts were, in

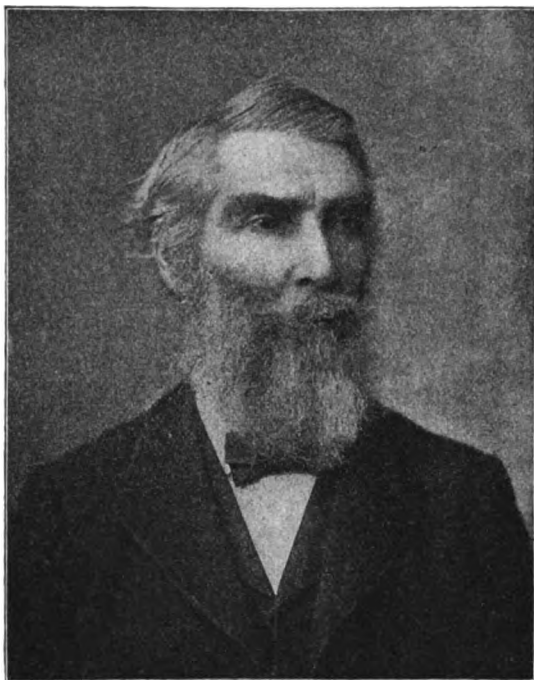
many counties, as fast as they were made, captured and destroyed, and on several occasions he narrowly escaped the repeated efforts to capture the court.

As a judge he was courteous, firm and fearless, and no appeal was ever taken from his decision as circuit judge. On the Supreme Court he exhibited the same qualities as on the bench of the lower court. He was twice a candidate for Congress, but his district was strongly Democratic and he was defeated. He some years ago retired from the practice of the law, and although now more than seventy years of age, is vigorous and lives in ease.

Charles Page Thomas Moore was born in Lewisburg, West Virginia (then Virginia), on February 8, 1831. His paternal grandfather was Colonel Joseph Peyton Moore, who wedded Mary Ellen Morgan of Virginia, and became the father of Nancy, Morgan, Thomas, George and Morris.

Thomas Moore was born in Shenandoah County, Virginia, and married Augusta Delphia Page, daughter of Major Charles Page and a native of Augusta County, Virginia. Unto them were born Vincent, Mary E. and Charles Page Thomas. Thomas died in 1832. The mother after a second marriage, departed this life at Lewisburg in 1844. Vincent, the oldest of the children died in 1897. The sister and subject of this sketch were adopted by their uncle, George Moore and his wife.

Charles P. T. Moore received his early



JAMES H. BROWN.

education at a local school and at the age of sixteen he was placed in Marshall Academy, of Huntington, West Virginia. Subsequently at the home of Honorable John I. Van Meter, in Pike County, Ohio, he received a three years' course of instruction under private tutors, later attended Jefferson College, Pennsylvania, and in 1853, graduated at Union College of New York under Dr. Eliphalet Nott, a celebrated educator and Presbyterian divine. In the fall of 1853, he entered the Virginia State University where he began the study of law, completing the course in 1856. In that year he was admitted to the bar, located at Point Pleasant, West Virginia, and began his career in the legal profession. He tried his first case before the late Honorable George W. Summers. It was the defense of a man charged with arson, and it was generally believed that he was guilty and would be convicted, and though the state was

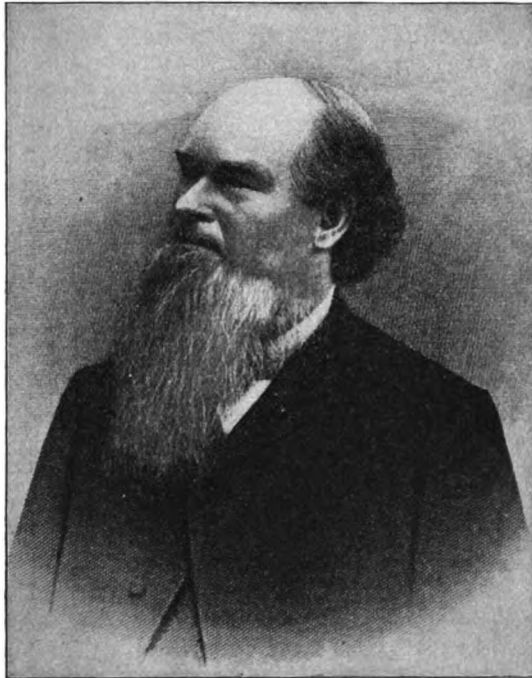
ably represented, young Moore conducted his client's cause with such consummate skill and ability, and his argument to the jury was so clear, powerful and pathetic, that the prisoner was acquitted. His conduct of this, his first cause, was long a theme of conversation among those who witnessed the trial, and he at once stepped into a fine practice. He has, on more than one occasion, remarked that he has never surpassed his maiden speech delivered in the defense of his first client. He seems to have acted in the belief that

this first appearance on the criminal side of the court was the tide in his professional career, and happily he took it at the flood.

In 1860 he was elected commonwealth's attorney for Mason County, which position he held until the outbreak of the Civil War. After the close of the war, he continued the practice of his profession up to 1870 when he was chosen the regular nominee of the Democratic party by acclamation for Judge

of the Supreme Court of Appeals, and so popular was he with the masses that the Republicans declined to name any person to compete with him in the election, but nominated him also by acclamation—something entirely without parallel in the whole history of our judiciary in the State.

Judge Moore drew the long term of office, being for the full term of twelve years, and he remained a member of the court until his resignation, which was reluctantly ac-



C. P. T. MOORE.

cepted in the year 1881. He was one of the most conscientious judges that ever graced the bench of our Supreme Court. Like Chief Justice Hale, one of the most illustrious of English jurists, he never entered upon the consideration of an important case without first invoking the aid of the Supreme Judge of all mankind to assist him in coming to the proper and righteous decision. He preferred equity practice, for the reason, assigned by himself, that in law cases he was frequently called upon to prosecute

his client's interests against what conscience dictated.

He regards Tucker's Commentaries, Davis's Criminal Law, and Robinson's (Old) Practice, as the great landmarks of Virginia law. He was very careful and painstaking in the preparation of his opinions. He believed in arguing causes to juries and thinks the successful lawyer must never omit this important feature in the trial of his client's cases. We must not omit to state that Judge Moore, in connection with Dr. Letterman (deceased) founded the Phi Kappa Psi Fraternity in 1850 when a student of Jefferson College. The membership of this Fraternity numbers the ablest literary graduates of every State.

In 1865 Judge Moore was united in marriage with Miss Urilla K. Kline who was born in Hagerstown, Maryland, her father being a native of Virginia. She was gifted with a wonderful voice and was in every way well fitted to be the wife of the illustrious subject of this sketch. Unto the union four daughters were born who, with their father, mourn the death of the devoted mother, which sad event occurred April 20, 1897.

After retiring from public life Judge Moore located on the estate in Mason County, bequeathed to him by his foster father. There he yet resides, and though approaching the evening of life, his friends will not forget the noontide.

LEAVES FROM AN ENGLISH SOLICITOR'S NOTE BOOK.

V.

THE SELF-WILLED LADY CLIENT.

BY BAXTER BORRET.

I ONCE overheard a clerk of mine solemnly invoke — well, it was not a blessing, upon my head for a fussy fidgetting old fogey. I am afraid I smiled a grim smile, and adopted the somewhat blunt epithet as a veiled compliment to myself. For I confess I always was both fussy and fidgetting, if those words signify nothing worse than persistent care and precision about small details of office work; and I am now at all events, if I was not then, “an old fogey” in Thackeray's sense of the term.

The life of an English solicitor, in active and varied practice, brings him in contact with many strange phases of life and character. In abler hands than my own the materials to be collected from my “note books” would, I dare say, furnish plots for well spun-out works of fiction. But I take it that the

readers of “The Green Bag” look to its pages for fact, not for fiction; and the old adage still holds good that “truth is often stranger than fiction.”

Amongst my clients at Georgetown was an old lady who had come to reside in the town some years before I myself settled down there. I made her acquaintance casually, in the course of some business in which I had occasion to search through some title deeds which she kept in her own custody; and, from what she told me in after years, I believe that she was struck with my persistent care and precision over some small details of the business; (others, besides my clerk, might have called it fussiness and fidgetting.) Be that as it may, her own solicitor died shortly afterwards; and, upon his death, she called upon me, and asked me to act for her in

future; and, for a beginning, to go through her deeds and papers, and arrange them all for her in the iron chest which she kept at her own house. My investigation of her papers showed me that she was possessed of considerable property, acquired by her in the course of carrying on a good business as a milliner and dressmaker in the old days, before large coöperative stores were thought of; after she had retired from active business she invested her money judiciously by lending it out at good interest on small mortgages, reinvesting a goodly part of the interest; she was, consequently, in constant need of a solicitor to look after her business; and she became a profitable client.

But there was a strange reserve about her which forbade anything like an approach to personal intimacy; our interviews were strictly confined to the business in hand. On one occasion I ventured to go outside the subject in hand, and to advise her that, having no relations in the first degree, she ought to make a will so as to leave all her affairs in order whenever her time came to leave the world; I was abruptly told that when she consulted me about making a will it would be time enough to give her my advice about it; so I dropped the subject quickly, with an apology. Soon after this she sent for me again, and I could see that she was under some little excitement. She told me that she had an only sister, living elsewhere, who was separated from her husband who had, as she told me, treated her badly; she read to me extracts from the deed of separation, and said that her sister wanted advice about her right under it of making a will; and as to what would happen in the event of her dying without making one. I took a careful note of the wording of the deed as she read it to me; it was rather clumsily drawn; it provided for the husband receiving an annuity from the wife so long as he lived and did not molest the wife, or the son who was the only child of the marriage; and the wife, on her part, covenanted to maintain the son at her

own expense during his minority; and the husband, on his part, covenanted not to molest either the wife or the son; and further that the wife should, during her life, enjoy all her own property as fully as if she were a *feme sole*, and should have power to dispose thereof by will; but the deed did not specifically provide that in the event of her dying intestate her property should pass to her own next of kin as if she had never been married. I, of course, advised that in view of the ambiguity of the language used it was of the utmost importance that her sister should make a will; otherwise the husband might on her intestacy claim everything as her sole next of kin. She thereupon asked me to draw out a will for her sister to sign, providing for the annuity being paid to the husband during the rest of his life, with a trust over in the event of his becoming deprived of the benefit of the annuity by act of law, or of any attempt to alien or anticipate the payments; and, subject to the annuity, there was to be a bequest of everything to the son absolutely.

Some few years after this she again sent for me, and I found her strangely excited. She asked me if I could recall from memory the terms of the will which I had drawn up for her sister to sign, and I was able to tell her that (thanks to my fussy fidgetting habits) I could at once lay my hand on the draft of the will and, if need be, make a perfect copy of it; and I began asking her some questions about her sister which I found she tried to evade answering. At last, however, she told me frankly that her sister was only a mythical person, and that (as some of my readers may have been sharp enough to suspect, though I confess I myself had not) she had, in telling me her supposed sister's history, told me the secret of her own life. Poor soul! Fate had indeed dealt hardly with her. She had married early in life a handsome but worthless fellow, whom she had supported by her own industry in the first years of their married life, and who had deserted her, soon

after the birth of her boy, for some other woman. She told me the history of her struggles to keep up a home for the boy, and to save him from coming under the control of his father. There were no bitter words of reproach against her worthless husband, no fiery outburst of indignation, such as might reasonably have been expected under the circumstances; it was only when she came to tell me how she made up her mind that it would be best for her boy that she should part from him and send him abroad, that her calm self-possession at last broke down; and then her grief was indeed piteous to behold; but she mastered it at last, and went on to tell me that her son was doing well in a position of trust in Belfast, and that he and she met once every year for a short two weeks of holiday in the Isle of Man. But now all her anxiety was again aroused; it appeared that she had gone to London after our former interview, had called on a friendly banker there, through whom the payments of the annuity had always hitherto been made, and had, with his friendly help, signed the will in the form which I had drawn for her supposed sister to sign, and had left it with the banker for safe custody; but that he had, unfortunately for her, in an unguarded moment, let out to her husband that he held the deed of separation, as also the will, in the strong room of the bank; and that she had that morning heard from the banker, that one day, during his temporary absence, the will and the deed of separation had been handed over to a lady who had called with an order which purported to be in her handwriting, but which was a forgery, as the banker had discovered soon after his return to business. The immediate question was what should she do now. Her banker advised her to go up to London, and take steps to prosecute her husband for forgery; but this advice she would not entertain for a moment, and she startled me by saying that her banker had no grounds for suggesting to her the thought that her husband could be so wicked as to commit for-

gery. (How little can we men fathom the hearts of women!)

This gave me my cue however. I pointed out to her that the loss of the deed of separation was not an irretrievable misfortune, so long as she had a perfect copy of it; and that a new will could be signed at once, and could be lodged in my own office for safe custody, and that the payment of the annuity could be continued as before, as though neither she nor the banker knew of the loss of the documents. I dare say some of my readers will think my advice was cowardly, and that I should have counselled her to take more drastic measures, and at least to suspend the payments of the annuity; but I saw at once from her manner that no such advice would be adopted by this calm, self-possessed and self-willed lady; and on the whole I could not but feel that by adopting the course I suggested her own wishes would be carried into effect, and her own best interests, and those of her son served more effectually than by a prosecution with its consequent public exposure. Whether I was right or wrong, she eagerly adopted my advice; the banker was instructed to continue the payments of the annuity, and to say nothing about the loss of the documents. Her words on signing the fresh will were "once a husband, a husband forever."

The last time I saw her was when she was on her death-bed. With no great stretch of fancy I can see her now, as she lay paralyzed but conscious; calm and self-possessed as ever; her son was with her, and her last charge to me was "you will see that my husband does not come to want, or to any harm, so long as he lives and does not molest my boy," and then when I had given her my promise, she said with a very sweet look on her face "once a husband, a husband forever." These were the last words I ever heard her utter; she died that night.

About ten days after her death I had a call from a rough looking man, dressed in shabby mourning, evidently second hand,

who still retained some trace of former good looks, not wholly defaced by self-evident evil habits. He introduced himself to me as her husband, and said he had come down, having heard of her death, to claim his rights as he called them. He brought with him a smooth-faced man, whom he introduced to me as a lawyer from London; and such he may possibly have been, for London produces many curious types of the profession. They tried bluff and bullying, but found they had mistaken their man. I showed them at once that I was master of the situation, and told them straight out that I was then engaged in applying for probate of a recently executed will. The London lawyer slunk off crestfallen. I confess I so far departed from strict professional etiquette as to suggest to the husband that he should call on me a little later on without his lawyer; and that I bribed the latter to leave the town at once by a promise that if he would accompany my clerk to the railway station he should be repaid the cost of his journey, and

a nominal fee for himself, on the train starting with him inside, but not otherwise; and he accepted the bribe eagerly.

The subsequent interview between the husband and myself was a long one. I do not aspire to be called eloquent, but such a touching story of faithful love unrequited as I had to relate to him made me, I dare say, speak solemnly from my heart, which is after all, I venture to think, the mother of true eloquence; before I had ended my story he was on his knees sobbing like a child.

A few flowers were found on her grave in the cemetery, placed by an unknown hand; and the world at large never knew that the self-possessed and self-willed old lady, whom all imagined to be a lonely widow, left behind her a husband whom she had loved to the last in spite of all his sins, and who mourned her loss in penitence. Verily the love of woman is as far beyond the comprehension of man as are some of the other secrets of Dame Nature.

CHAPTERS FROM THE BIBLICAL LAW.

III.

THE "CORONER'S" INQUEST AND THE CEREMONY OF EXPIATION.

BY DAVID WERNER AMRAM.

IN the twenty-first chapter of Deuteronomy, from the first to the ninth verses, will be found a record of an ancient procedure, which I have entitled, The "Coroner's" Inquest and the Ceremony of Expiation. It describes the procedure in cases when a dead body is found lying in the fields; how investigation is made and how, finally, the town elders within whose jurisdiction the crime has been committed must make expiation. Before considering the record, a few words concerning the judicial system of those days may

assist the reader in forming a clearer conception of the nature of the procedure.

Before the establishment of the monarchy and the organization of royal courts of law by the appointment of royal judges, the judicial system of the Hebrews was not organized on a national plan. Each community was independent, and its affairs were administered by its council of elders, who were the executive and judicial officers. Judges, so-called, do not appear in Jewish history until after the beginning of the kingdom; in the old

days before there was a king in Israel when every man did what was right in his own eyes, the elders of the towns were the only authorities and the title "judge," or as it is in Hebrew "Shophet," was not applied to judicial authorities. It was a military title only. The law administered by the elders was the immemorial custom of the community, which naturally varied in different parts of Palestine. All the tribes of Israel did not enter Palestine at the same time nor by the same road; they were thrown into contact with different people, whose customs insensibly influenced them. These and other reasons counteracted the influence of territorial contiguity after their settlement in Palestine and served to keep their customs and common law distinct. But in the course of time the settlement of kindred tribes in neighboring territory affected the tribal exclusiveness. Intermarriage became more and more common, and these causes, together with the necessity for common defence against foreign foes, who frequently invaded the land, united the tribesmen into the beginnings of a nation. With this political union came assimilation of their common law, until the people in various parts of Palestine had customs and common law not very different from each other. In the case of Zelophehad's daughters, which we discussed in the January number of *The Green Bag*, we saw the beginning of the effect of intermarriage between members of different tribes, in breaking down the tribal barriers. In the twenty-first chapter of the Book of Judges the intermarriage between the surviving Benjaminites and the daughters of Jabesh Gilcad and of Shiloh is recorded, a sufficient indication that at the time when this account was written, the people were fairly on the road toward complete assimilation.

In all these communities the elders were the sole authorities until the kings began to interfere in local affairs and appointed their "judges" and "sheriffs" for the various towns of the kingdom. The old councils

were not thereby abolished, nor were they superseded by the royal officials. The latter sat with them and acted as supervisors of the proceedings, and it is only in the last days of the kingdom that they usurped the authority of the elders. In the record which we are considering, the elders are the immemorial heads of the community who act as a jury in the investigation of the case and the "judges" are the "coroners"—the crown officials—who supervise the proceedings. Let us now turn to the text: "If one be found slain in the land which the Lord thy God giveth thee to possess it, lying in the field," it became the duty of the elders of the towns round about to constitute themselves an inquest, with the royal officials, the "coroners" at their head to investigate the case and endeavor to discover the murderer. This may have been done by each body of elders independently or by all of them acting together; concerning this question we have no light from the record. If after such an investigation or inquest the murderer was discovered, he was tried by the elders of the town within whose territorial limits the dead body was found.

If the elders found him guilty of wilful killing, he was handed over to the kinsman of the murdered man to be put to death. Anciently the crime of murder was a private family matter punishable not by public law but by the nearest kinsman of the dead man, the "Avenger of the Blood," as he was called. After the settlement in Palestine, public opinion could no longer tolerate the unrestricted exercise of this right of vengeance because of the bloody consequences which it entailed. One murder led to another, and the quiet farmers of Palestine would not brook this interference with their peace, although as wandering nomads it had been their immemorial custom. Hence the town elders tried the slayer and would not permit the Avenger to put him to death until his guilt had been judicially determined by them. Then he was handed over to the Avenger

to be slain. The Avenger was no longer the representative of the aggrieved family, but became the public executioner, and inflicted the death penalty by the decree of the elders.

If after the inquest "it be not known who hath slain him," then the elders and the royal judges of the various surrounding towns met as a grand inquest for the purpose of officially determining the question of jurisdiction involved, by ascertaining by actual measurement the nearest town to the place where the body was found. "Then thy elders and thy judges shall go forth and shall measure unto the towns which are round about him that is slain." The nearest town having been thus ascertained, the grand inquest had completed its duties, and it disappears from the record, and the following procedure devolved upon the elders of the nearest town alone. It was they who performed the ceremony of expiation. For the purpose of understanding this ceremony, it must be remembered that anciently family, tribal and territorial solidarity were very strong, and the family, the tribe and community were responsible for the crimes committed by one of their members. In the first place, the family law provided that the members of the family were all responsible for each other, and that the deeds of one were visited on the others. The members of the family were responsible agents, for whose acts all of the family were held liable. The later law put an end to this by declaring that "the fathers shall not be put to death for the sons, nor shall the sons be put to death for the fathers, each man shall be put to death for his own sin." (Deut. xxiv. : 16.) But before the doctrine of individual responsibility was established, the old family solidarity was extended to the tribe. The tribe was but the larger family, every one of its members claimed descent from a common ancestor whose name the tribe bore, and they were responsible for the acts of each other. Upon settlement in Palestine, territorial contiguity

established new relations, differing from the tribal relations, and the old principle of solidarity was applied to the new conditions. All the members of the same community whether of the same tribe or not were responsible for the acts of their fellows. If a crime was committed within the territorial limits of the town, it became the duty of the community, acting through its elders, to endeavor to find the guilty person, and, if they did not succeed, the duty of making reparation devolved upon the community. Now what was the reparation that could be made in criminal cases? In such cases the law of retaliation was invoked; life for life. This is the reason for the offering of the heifer by the elders of the town. In their official capacity as the representatives of the town they make expiation for the crime committed within its limits and shed blood for blood, thus symbolizing the death of the murderer. This offering of the sacrifice came afterwards to have a religious signification which is also reflected in our record. "And it shall be that the town which is nearest unto the slain man; even the elders of that town shall take an heifer which hath not been wrought with and which hath not drawn in the yoke; and the elders of that town shall bring down the heifer unto a rough valley, which is not ploughed nor sown, and shall break the neck of the heifer in the valley. And all the elders of that town which are nearest to the slain man shall wash their hands over the heifer, whose neck is broken in the valley and they shall commence and say, Our hands have not shed this blood, neither have our eyes seen it. Forgive thy people Israel, whom thou hast redeemed, O Jehovah, and lay not innocent blood in the midst of thy people Israel." Thus responsibility for the crime was averted by a solemn declaration of innocence. "And the blood shall be forgiven them." The offering of the heifer was a symbolization of the shedding of the slayer's blood, and, at the same time, an act of sacrifice to God, to appease the divine wrath, and

seek forgiveness for the blood guiltiness that rested on the community because of the unavenged crime. The antiquity of this ceremony is attested by the fact that the heifer is not killed in the usual manner but has its neck broken ; and furthermore, by the symbolic act of washing the hands over the carcass. Among the ancients, before courts of record were established and written records took the place of the memory of the witnesses, symbolic acts were the usual methods of fixing important facts in the memory of the community. There are other suggestions in this procedure that must have some meaning, but their true reason escapes us. Why the animal must be a heifer which has never done any work, and why the sacrifice must be made in a rough valley are problems which I am not now prepared to solve. It is not improbable that in these requirements we may find survivals of the old beliefs and forms of sacrifice that antedated the adoption of the monotheistic cult of Jehovah, with its great central sanctuary at Jerusalem.

I have purposely omitted the fifth verse of our text, because its introduction breaks the continuity of the account. It is as follows : "And the priests the sons of Levi shall come near, for them hath Jehovah thy God chosen to minister unto him and to bless in the name of Jehovah ; and according to their decision shall be done at every controversy and every injury." The priests are introduced here before the ceremony of washing the hands ; they seem to have no part in the act and are introduced because to the chronicler their presence seems to have been necessary to the validity of the ceremonial act. That they were not originally among the parties seems to be perfectly clear from the text. In the most ancient times the elders of the towns were the only functionaries known, and the ceremony goes back to the most ancient times long before either the kingdom or the

hierarchy was organized. The elders are the only legitimate functionaries here ; both the "judges," who were the crown officials, and the "priests" are later additions to the ceremonies.

It may be that under the ancient custom if the slayer was discovered after the ceremony of expiation, he could take refuge behind the ceremony of expiation and claim exemption from the punishment by reason of the fact that the elders of his town had publicly atoned for the crime, and that therefore it was *res adjudicata*. But whether this be true or not cannot be stated with certainty. The record ends with these words : "And do thou put away (the guilt) of innocent blood from thy midst, if thou wilt do that which is right in the eyes of Jehovah."

There is a Talmudic tradition that this clause was added to the Biblical record in order to provide for the punishment of the murderer, if he was discovered after the ceremony of expiation. This seems to imply that anciently the murderer could plead the ceremony of expiation in bar of the indictment, on the principle that, after the formal inquest and declaration of innocence of the elders on behalf of the community, and expiatory sacrifice, the matter was ended ; and that so far as the members of his community were concerned, the procedure was equivalent to a trial and an acquittal. The strangeness of such a plea must not lead us to conclude that it was impossible, for the ancient notions of crime and punishment differed radically from those which now obtain. Attention need only be drawn to the oath of purgation known to us at old English law whereby a man might purge himself of crime by an oath supported by a sufficient number of compurgators. Although the cases are not parallel, they have a common element of strangeness and remoteness from modern methods of procedure.

WITH A STUFF GOWN IN THE MOFUSSIL.

BY AN ENGLISH BARRISTER PRACTISING IN INDIA.

MOFUSSIL, an Anglo-Indian word, designating the up-country as opposed to the city, is the name given to the vast area of townships on which European civilization has not yet had time to imprint its veneer of shops and tramways, gas lamps, and conventional streets, and where the kerosene oil tin is still practically the only visible and tangible sign that the Western civilization is abroad, save that little group of thatched bungalows far away from the native city's hubbub—dubbed a station—where the English rulers live.

These few dwellings are almost always clustered round a court-house; there may be many courts, there may be but one, but among the dwellers in the bungalow there will surely be a barrister.

It is apt to be forgotten when the question is asked, "Why do so many men still get called to the Bar?" that the Inns of Court provide counsel for the whole of the countries over which the British flag waves—the lands on which, we are told, the sun never sets. At the well-known dinners which have to be eaten to qualify as a barrister, there may meet, at the same mess of four, the counsel who are to appear on behalf of the American, the African, and the Asiatic litigant, cheek by jowl with the man who has elected to remain and help his European countrymen in their home litigation. Your counsel is your true cosmopolitan.

Many men go to India from the Inns of Court, but most of them to the Presidency towns—that is to say, to conditions of legal life which are European in method and everything else, save in "the strange sea change" that has come over the matter in litigation. One thing the barrister practising in the mofussil and he who seeks his fortune in the Presidency town have in common—each

leaves his wig safely locked up in its tin box, and, though clad in his gown and bands only, is not denied audience. Thus, to describe the life of the counsel in the Presidency towns is simply to repeat the life of the home-stayer here, briefless and briefed—only out there the weather is hot.

But the man in the mofussil is different; he may be a native, or he may be a European. Of the former who shall speak? He is a language and a law unto himself. The Englishman who goes up-country to practise at the Bar generally does so more or less by chance. In Calcutta and Bombay the Court language is English; in the mofussil depths it may be anything from Marathi to Pushtuk, and this is a deterrent to the English born tyro. However, there are a number who do make the venture, from one reason or another, and for a time expatriate themselves. The plunge over, the barrister finds himself in the heart of Central India, far from the use and wont of ordinary town life, the proud possessor of a number of bare, matted rooms and a large verandah, instead of chambers, with a native clerk.

Word has gone throughout the bazaars of the native city that a new "Balister Sahib" has come from the great "Wilayet" the Homeland.

Counsel sits and waits for briefs. His office opens out into the verandah where his "chuprassie" sits; he might wait forever. Solicitors there are none in the mofussil land; counsel's advertisement board, with his style and designation in English and vernacular, painted thereon and stuck up on one of the two pillars at the end of the drive up to the bungalow, is his only possible direct appeal to the multitude.

However, that is quite enough; there is nothing the natives like better than litigation,

and a new counsel is as interesting to them as a new ironclad to the rulers of nations. They come, clients approach the verandah, a party of at least three in all — smooth-skinned natives in puggaries and white raiment; they come in a number, greater or less, as the case may be, for safety's sake, but never alone — the litigant *solus* might spoil the case or settle too big a fee. Off come all the shoes in the verandah, and the party enter and seat themselves, some on the chairs, the lesser lights on the floor in front of the office table. The whole of the case has to be elicited from them direct, if it is an original case, a process always of no small difficulty, however fluent counsel may have become, in time, at the languages; for the salient points of a case to a Western mind are those which to that of an Oriental seem the most remote from the issue. Counsel having heard everything, noted it down, and taken much time and trouble, the fee is mentioned; and when the amount is first named by the clerk, be it high or low, be it tens or thousands of rupees, one course alone presents itself to the litigant's mind — he at once offers one tenth. No matter how inexorable he may know the man whom he wishes to retain is when once the fee is fixed, still the native must haggle; he will even go away and return again and again, or, if the barrister at once terminates the interview, will sit out in the verandah and discuss the matter with any one handy.

The important preliminary finally settled, the litigant resorts to a new shift — suggests in vain that part shall be paid now, and the rest when the case is won; or if the amount of the fixed fee is a large one, he will still endeavor to get the brief taken for less than that. Of the time and trouble already spent he reckons not, and the novice who allows any part of the fee to stand over need never hope, unless the case is won, to see the balance. If other clients come up meanwhile, they patiently sit on the verandah on their haunches until the interview within is terminated, even though it should last for hours.

Counsel having satisfactorily obtained his case and reduced his notes to something which is more or less of a brief, the next thing to decide is the court in which the case is to come on. Civil litigation in the mofussil comes before judges of varying monetary and local jurisdictions, whose decrees are appealable to higher courts, and the decisions of those higher courts in their turn are appealable on points of law to the Supreme Court of the province.

It is in this Supreme Court, which is cognizant both of the civil and the criminal courts, that the English barrister is enrolled on payment of a fee, etc., and thus becomes entitled to practise before it and in all courts subordinate to it. On the criminal side there are magistrates of three grades according to the powers they possess, as well as Courts of Session and the Supreme Court. Appeals are permissible in certain cases.

On the civil side, there are no juries in the mofussil; on the criminal, a European is entitled to have one empannelled, and the Courts of Session are always assisted by two native assessors, who are called on in the same way as jurymen at home to serve. The barrister, as a rule, then must formulate his views, legal and of fact, with regard to the effect which they are likely to have upon a single mind. It is a system for and against which much may be said.

The majority of the judges are members of the Indian Civil Service, also engaged in executive work — a fact which at times leads counsel a pretty dance, when they go on tour in the district, more especially in criminal cases; but for the most part the courts sit in suitable buildings erected by Government, and thither the barrister must hie to institute and conduct his client's business. The large compound which surrounds the building is full of natives, suitors, and witnesses, squatting in groups under the trees or roaming round the petition-writers in the verandah, who are recording in the vernacular what the litigant in person intends to inflict upon a

patient court. It is a curious scene, to see a stuff gown go fluttering in and about, followed by a *queue* of more or less clad clients. The courts themselves are strange, informal places. Like a schoolmaster, on a dais, sits a European in flannels or riding kit, his native reader at his side; in front, beyond a barrier, are a table and seats for counsel (rough and meager accommodation), a witness-box, and a dock: a native is squatting in a corner minding files of cases or writing summonses.

If a case is proceeding, each witness in turn, as he comes in from the open compound, is made to sit in the court until after the other witnesses have been examined, otherwise possible matter for cross-examination would suffer. All the examination is in the vernacular, but the court is addressed in English, and records the substance of the evidence in that language; or the case may be before a native judge, when the scene becomes more or less of an Asiatic "at home."

In the appellate courts matters assume a more civilized and Western air. As long as his means last a native appeals, no matter how trifling the dispute, and thus in a great number of instances the decision of a case has passed through three sets of hands. The personal equation is a great consideration in the mofussil, and it can hardly be expected that every Cincinnatus taken from the plough of executive work will prove another Solomon.

If the English barrister has, as is very possible, more appellate than original work, he will find his life "in chambers" passed in reading judgments, on behalf of the losing party, who desires to be assured that he will win on appeal. Appeals on the most trifling values are sometimes brought by the smallest cultivators. The great subject of civil litigation is land, and for this, no matter how small the area, the fight is to the bitter end. The tenure of land is the backbone of the mofussil civil courts combined with the facts of adoption and inheritance.

The mofussil barrister passes his legal life in an atmosphere of ideas, which are as remote from that of his own existence as fact from fiction.

Then there are the criminal courts, and here the idiosyncrasy of the native comes into full play. His great idea is to use the penal code as a weapon of offence and defence against his civil opponents. To give an example. In a dispute about land each party will hope to run the other in for criminal trespass, or something similar, as a preliminary canter, in the hope that, besides causing annoyance, that course may possibly provide evidence for the civil suit.

Of witnesses little can be said; the counsel has to work with the stuff given him. All that need be said is that each side provides its own, and that counsel has no depositions, neatly taken by the solicitor, to go upon, and in a criminal suit prays devoutly and often that he were being duly instructed like his brother of the Bar at home.

But the English barrister is not the only legal practitioner—he may have Hindoo brethren; and, in addition, there are native advocates and pleaders in swarms, the advocates being legal practitioners, entitled to practise in the Presidency High Courts, and the pleaders being locally enrolled. They are legal quibblers and word-spinners, "congress-walas," almost to a man. Individually they are agreeable and pleasant, and as friendly as is possible, considering that there is the great gulf of "no meals together" fixed between them and the Christian and Mussulman. Professionally, their competition is of the keenest, and the English barrister has formidable rivals to fear. It is only the start which is easier for him. With regard to the work itself, there is a weird fascination in the nature of the cases—witchcraft and astrology, the strange ceremonies of adoption and funerals—something new and curious is constantly occurring. Besides, there are many amenities of life to put against the climate; even going out for cases to the white

tents in the jungle, where the court is on tour, has its pleasant side. There is some English society ; riding and shooting are at every one's service, and there are no servants to compare with our native attendants.

To go out for a short term of years is no

bad policy for a youngster, he learns to hold his own in suits, and gains that practical experience of humanity and of the conduct of cases which nothing but actual responsibility can give, and which means success at the Bar all the world over.

LONDON LEGAL LETTER.

LONDON, March 3, 1900.

RECENTLY in this column reference was made to the celerity with which business was despatched in the English courts by reason of the fact that no part of the day is taken up by hearing applications or interlocutory motions, or the argument of demurrers or pleas in abatement in the trial court ; the entire time of the judge, from his entrance into court until he rises for the day, being devoted to the trial of the cases on his list. It may naturally be asked how the judge can rid himself of such applications, or how issue can be joined in any cause, or how it is possible for a case to be prepared for trial, without such preliminary proceedings. It is accomplished through the intervention of masters, of whom, in the Queen's Bench Division, there are no less than ten. These masters sit practically throughout the year ; they are appointed for life, and as vacancies occur, by the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls, in rotation ; they must be barristers or attorneys of not less than five years' standing, and they receive a salary of £1,500, or \$7,500, a year, with a pension on retirement. They have authority to transact any such business and to exercise any such powers and jurisdiction as by statute or the rules and practice of the court were, before the act appointing them went into effect, to be transacted and exercised by a judge sitting in chambers—except that they have no jurisdiction in questions relating to the liberty of the subject and in respect

of a few other special matters. Six of the masters are selected to attend as masters in chambers during each of the four sittings of the court, and these six, by arrangement amongst themselves before the term begins, select three of their number to sit every Monday, Wednesday and Friday, the remaining three to sit on Tuesdays, Thursdays and Saturdays throughout the sittings. The four other masters act as practice masters whose special duty it is to be present at, and control the business of, what in this country is known as the "Central Office," which is practically the same as the clerk's office and sheriff's office in an American city. These practice masters give the necessary directions with respect to questions of practice and procedure relating to the business of the central office, and from time to time issue rules and directions to govern it. While these rules have no statutory authority, they are nevertheless generally followed, and they save no end of trouble, and prevent the courts from being bothered by details of practice and procedure.

The moment a writ has been served and appearance has been entered, the plaintiff "takes out a summons," or, in other words, applies to a master for directions as to the next steps that shall be taken in the action. Notice of the application is served upon the defendant. When the parties have appeared the master examines the endorsement on the writ and hears the plaintiff and the defendant as to the nature of the action. He then makes such orders as the interests of justice

appear to require. He may direct that there shall be no pleadings of any kind, the endorsement on the writ being in his judgment a sufficient notice to the defendant of the nature of the plaintiff's claim, and the letters or other admissions by the defendant of the defence the latter is going to set up. He may, on the contrary, not only require pleadings, but he may rule both parties to furnish the other with further particulars of any allegations in their pleadings. He may also order the production and inspection of books and other documents, and the admission of facts therein contained, in order to prevent the expense of formal proof of such books or documents or facts at the trial. He may also give leave for the delivery by either party of interrogatories to the other, or for a commission to issue for the examination of witnesses, either within or without the jurisdiction. And, finally, he will name the place of the trial, and, after deferring to the wishes of the parties, will state whether the trial shall be with or without a jury. This clears away a great deal of the preliminary matter which would otherwise serve to clog the machinery of the courts. Afterwards, if applications of any kind are to be made, they must be made to the same master who settled the directions. If, for example, either party complains of the other's pleadings, or objects to the particulars as being insufficient, or wants further discovery, the master is asked to settle these matters also.

One of the most important and useful of the master's functions is to hear applications for judgment in what are known as "Order 14" summonses. In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money, arising after a contract express or implied — as for instance on a bill of exchange or note or cheque, or other simple contract debt — or on a contract or bond under seal for payment of a liquidated amount; or on a statute where the sum sought to be recovered is a fixed sum of money; or on a guarantee where the claim

against the principal is for a fixed sum, the plaintiff may specially endorse upon his writ the relief or remedy to which he claims to be entitled, and may then, under Order 14 of the rules of court, apply for leave to enter final judgment for the amount endorsed on his writ. In support of his application he need only file an affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and amount claimed, and stating that in his belief there is no defence to the action. The master may, therefore, unless the defendant by affidavit or his own *viva voce* evidence or otherwise shall satisfy him that he has a good defence to the action on its merits, make the order allowing the plaintiff to enter judgment; or he may give the defendant leave to defend upon condition that he pay the money in dispute into court, or find security for it. This may seem a hardship, but the rule rarely if ever prevents an honest defendant who has a good defence to an action on the merits from defending the action. He has the opportunity of disclosing the merits in his affidavit, and it is the practice to refuse the order for judgment if there is any reasonable prospect of an honest defence being set up. For a mere technical defence, however, very little consideration is shown. From every ruling of the master in the way of an order there is an immediate appeal to a judge in chambers.

And herein lies another explanation of the means by which the time of the trial court is saved. There is constantly, or at least daily, in attendance at a particular room in the courts, a judge whose time, or so much of it as is necessary, is devoted to hearing motions and applications. He may exercise all or any part of the jurisdiction vested in a single judge in the High Court of Justice, but in practice he confines himself to those motions or applications of an interlocutory nature. Any one desiring to apply to him must give notice to his clerk, and a list of his business is prepared and published in the daily cause

list. He sits daily from eleven until his work is concluded, hearing first *ex parte* applications, then matters in which counsel appear, and later on those attended only by solicitors. The practice is simple and business-like. An officer guards the door and allows in the room only those whose application is being heard and those in the following case. The judge without vestments sits behind an office table, in front of which are grouped the parties, standing. The matter is stated concisely, and "prejudice" and irrelevant talk is not encouraged. In this way a "strong" judge is able to get through a mass of work in a short space of time. The appeal from the master to the judge in chambers must be brought within five days, and if the appellant is not satisfied with the ruling of the judge he may appeal to the Appeal Court, but must file his appeal within eight days. This practice not only insures a speedy determination of the matter but provides a way in which an appeal may be heard in interlocutory matters.

To illustrate the working of the practice I may mention a recent action in which the writ was served within the past three or four weeks, and in which final judgment has already been signed against the defendant. The action was brought by an insolvent American national bank and its receivers to recover \$3,000 from a shareholder resident in England on her double liability under the statute. The endorsement upon the writ was in these terms: "The plaintiff's claim is for an assessment on shares due from the defendant as a holder of shares in the plaintiff company and interest thereon. Particulars: To assessment of \$100 a share made on March 14, 1899, by the Comptroller of the Currency of the United States of America as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States, payable this day on 30 shares of stock in the capital of the plaintiff bank standing in the name of the defendant, \$3,000, or £ 614. os. 4d.

This is all the pleading there was in this

action for \$3,000. The moment the defendant entered an appearance the plaintiff served her with notice of his intention to apply for leave to sign judgment under "Order 14," the claim being for a liquidated amount. In support of his claim the plaintiff filed the usual affidavit alleging that the defendant had no defence to the merits. The defendant set up in her affidavit that she was a British subject, that she bought the shares in England, that they were fully paid, that she did not know of the existence of the Statutes of the United States, that they had no extra-territorial effect, and that if these foreign statutes imposed any liability upon her in the way of an implied contract she was entitled to defend in order to ascertain the nature of that liability. The master, after hearing counsel, made an order granting the plaintiff leave to sign judgment unless the defendant paid the £614 into court. The defendant appealed and the appeal was heard before the judge in chambers four days later. The judge declined to interfere with the order, holding that the defendant by taking shares in a foreign bank had impliedly contracted to be bound by the statutes or laws under which the bank was organized. It was urged, but in vain, that there was no proof of the terms of the statute, or that the bank was insolvent, or that the plaintiff had in fact been appointed its receiver, or that the Comptroller of the Currency had made any assessment upon the shareholders, or of the amount of such assessment, if any. The judge merely answered that the affidavit implied that the statute authorized the assessment, and that the necessary steps to enforce it had been taken, but if counsel for the defendant would say that he had any reason to believe that there was any irregularity in connection with the action of the Comptroller of the Currency or of the receiver, he would allow the defendant to defend. Counsel could not in conscience say this, and so the judgment was entered. Such certainty in deciding cases of so much importance is cal-

culated to take away the breath of an American lawyer, who would doubtless also be amazed at the way in which documents are received in evidence without being proved, and the way in which the action of the court is affected by the conscience of the counsel. But the English practice has its advantage. There was in the case mentioned no defence whatever to the action. The defendant was

a shareholder and liable as such to the assessment. Had leave been given her to defend, she might have put the plaintiff to great expense and trouble to prove his case, and the end might have been postponed for twelve months. But the end was inevitable. The judge saw this and the conscientious counsel could not deny it.

STUFF GOWN.



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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

FACETIÆ.

A farmer named Parks, who was noted for driving hard bargains, agreed to lease his farm to an illiterate wag named Buffington. Parks employed a pettifogger who drew up the lease, after the manner of his tribe, with an unscrupulous regard for his client's interest and a bountiful repetition of the word, "said."

After the lease was completed Buffington was called in and the instrument was read to him.

"I won't sign it," said he. "Why won't you?" exclaimed the farmer indignantly. "Because," he replied, "there's too d—— much of the said Parks and not enough of the said Buffington."

A LITTLE while ago a federal judge in a western territory remarked that if he should receive a letter that was not addressed to "The Honorable," he would decline to read it, taking it for granted that the writer desired to treat him with indignity. This recalls the story of the Georgia lawyer who had been elevated to the bench. His wife said to him, "Law, John, if you be Judge, what be I?"

"Oh," was the ungallant reply, "you will be the same old fool you always were."

MAGISTRATE (to witness) — "I understand that you overheard the quarrel between this defendant and his wife?"

Witness — "Yis, sor."

"Tell the court, if you can, what he seemed to be doing."

"He seemed to be doin' the listenin'."

THE wit of the Choates is a family trait. The *bonmots* of Rufus circulated in his day as Joseph's do in ours. By overwork Rufus had shattered

his health. Edward Everett expostulated with him on one occasion, saying:

"My dear friend, if you are not more self-considerate you will ruin your constitution."

"Oh," replied the legal wag, "the constitution was destroyed long ago. I'm living on the by-laws!"

MR. JOSEPH Choate's self-possession is seldom disturbed. Once, however, he was disconcerted. It was during the trial of a well-known will case. Mr. Felix McClusky, formerly door-keeper of the House of Representatives, was on the stand.

"Now, Mr. McClusky," insinuatingly asked the great lawyer, "isn't it true that you are the modern Munchausen?"

"You're the second blackguard that has asked me that within a week," roared McClusky, "and —"

He got no further; a roar of laughter at Choate's expense drowned the rest of the retort.

A LEARNED attorney of the Maryland bar was in the middle of a brilliant argument for a defendant, in a suit for damages (arising from the fact that the plaintiff's vessel had been sunk in a collision with the defendant's), and in the course of his remarks, said:

"This collision happened in the broad daylight and was witnessed by *divers* persons, who —" at this point the defendant, hearing the last words of the sentence and not being versed in legal parlance, rose to his feet and exclaimed, "Judge, that's a lie! Ther' ain't no divers in this case! I didn't hire none, if *he* wants them he's got to pay them, I shan't."

NOTES.

ALEXANDER II. introduced trial by jury in Russia, but the courts dispense with it as much as possible, and seek to abolish it altogether. The reason is not that the authorities wish to curtail the liberties of the people, for the most

progressive and enlightened judges are among the opponents of jury trials. They complain that it is difficult to muster an intelligent and impartial jury. The most incredible stories are told of Russian jurymen. Thus, the foreman of a jury declared he would not send a poor fellow to prison, because it happened to be his (the jurymen's) birthday. Another jury had agreed upon a verdict of guilty when the church bells began to ring. They revised their verdict because a holiday had begun. A burglar was allowed to go free because the man whom he had robbed had refused to lend him money. This, in the opinion of the jury, was a direct incentive to crime.

JOHN RANDOLPH, of Roanoke, described Delaware as a State having three counties at low tide and two at high tide.

IN 1836 there were 52,000 convicts living in foreign lands in a state of bestial immorality. Now, notwithstanding the increase of population, there are only 4,000 undergoing penal servitude. And in this country, in 1837, 4,000 debtors were lying in common cells, with damp brick walls, with no bedding, and herded with murderers and common malefactors. Now transportation and imprisonment for debt have been abolished. Just before the Queen's accession, a little boy was condemned to death for breaking a confectioner's window and stealing sweets. Now no one can be hanged for a less crime than murder. Executions are not in public; the terrible scenes of witnessing them are done away with, and I hope the sensational hoisting of the black flag will soon be a thing of the past. A friend of mine told me how, in his youth, he used to witness the executions at Tyburn. And within a few years there existed and may exist now, for all I know, on top of the house near the Marble Arch, which, when I was young, belonged to the Dowager Duchess of Somerset, a bench from which the frivolous and fashionable world used to witness with indifference, if not amusement, these terrible executions.—SIR ALGERNON WEST'S *"Some Changes in Social Life during the Queen's Reign."*

A JUDGMENT of the greatest importance and interest to railway travellers was delivered re-

cently by Judge Emden, says the London Globe. A gentleman travelling from London to Hastings had occasion to leave the carriage at Tunbridge Wells, and took the ordinary precaution of reserving his seat with his umbrella and newspapers. While he was absent another passenger seized his place and refused to vacate it until forcibly ejected. As a result an action for damages was brought against the original owner of the seat by the intruder, and a counterclaim for similar damages was entered by the other side as well. The judgment delivered was one which will commend itself to ninety-nine out of every hundred travellers. The claim for damages for ejection was dismissed and the counterclaim allowed.

For the future, therefore, the cantankerous individual who persists in disturbing the comfort and convenience of travellers in the manner indicated will know how he stands, and that if the owner of the seat thinks fit to bundle him out neck and crop, the latter will not only have the sympathy of the public but the law as well on his side. There can be no question whatever that the universal mode of retaining a seat in a railway carriage is a most reasonable and convenient one, and the thanks of the public are due to Judge Emden for his very clear and sensible interpretation of the law. Not the least important point in his judgment is his assertion that the holder of a seat was entitled to use reasonable force to eject an intruder.

ALEXANDER STEPHENS, Vice-President of the Confederacy, was a striking example of a great mind in an insignificant body. He used to speak of himself as weighing ninety pounds, dressed. History accords him a place as one of the greatest statesmen furnished by the South. Although he became prominent in secession councils, he clearly foresaw the folly of secession, and it was due to his influence and efforts that Georgia was one of the last States to secede. Opposed to him was Robert Toombs, the most rabid fire-eater in the South, who made himself notorious by his vindictiveness after the war, and who boasted he would die unreconstructed. Toombs was of gigantic build, always spoke in a loud, bombastic way, and, for all his ability, was a good deal of a bully. Although Stephens and Toombs early became leaders of rival fac-

tions in Georgia, they did not chance to meet until 1857, when they were retained as opposing attorneys in a lawsuit at the Washington county courthouse. Toombs strode into the courthouse before the court convened, and asked the sheriff in a loud tone :

"Sheriff, where is this man Stephens? I've heard a lot about him, but I never saw him."

"That's Mr. Stephens sitting there on the rail," replied the sheriff, pointing to a little man huddled up on the rail to the bar. Toombs marched over to the rail, gazed down contemptuously, and roared :

"So you are Alexander Stephens! Why I could eat you for my breakfast."

"Well, Senator," replied Stephens, in the shrill falsetto that once heard was never forgotten, "if you should eat me, you would have more brains in your stomach than you ever had in your head."

IN a book just published in Paris, entitled "The Mind of the Criminal," the author, Dr. de Fleury, attempts to set forth the golden mean between the extreme theories of Lombroso and his school and of those who utterly disbelieve all that the Italian professor upholds. Says a reviewer in *Cosmos*, June 3: "There do exist, uncontestedly perverted beings, destined for the gallows, whose natural home is the prison, and who are incapable of adaptation to the social environment. These born criminals, as Lombroso calls them, are what they are, he says, by reason of hereditary malformation of the brain—we all know these theories of the Italian criminologists, which are now almost abandoned. Others, with more reason, see in the perversity of certain creatures an effect of bad education that has not properly repressed certain tendencies, a result of imitation, an influence of environment. M. Maurice de Fleury in this popular work tries to hold to the golden mean. He explains clearly the physiology of the nervous system and the mechanism of reflex action, but personality, justice, and liberty are more complex ideas than he seems to think. The question of human criminality is not exclusively medical, and when the doctors have determined the cases—perhaps more numerous than has been supposed—in which responsibility has been suppressed or weakened because of some

disease, we shall still have to solve the problem of the crimes committed by normally organized but perverted beings.

For these last, moral education and especially religious training, the author believes, will be an element of preservation. He cites other things that may be of use, and finally he recommends that young persons who, although not vicious, are difficult to manage, should be sent to the colonies, with the hope that a life of hardship and adventure will enable them to make use of the exuberance of energy which, if it did not find an outlet in this way, might lead to crime. This form of prevention, which is difficult to use in practice, can be applied only to a restricted number of persons. Many criminals become so through idleness, carelessness, lack of will power; they fill our ranks with worthless material and never become any better.

Among many false notions, much interesting information is to be found in this book, and it is written in a style that makes its perusal attractive.

A CURIOUS piece of evidence bearing on the success of the English rule in India is furnished by the popularity of the courts established in that country and especially in Bengal. Litigation increases beyond the power of the existing force of judges to deal with it. Under the *pax Britannica*, disputes can no longer be settled by the sword, and murders and raids and family vendettas are things largely of the past. But the natives have learned that they can carry on their quarrels through litigation, and the agricultural classes are especially pertinacious in asserting their legal rights over land and irrigation privileges. The peasants not only resort to the courts, but they are not satisfied with the decisions of the tribunals of first instance. The number of appeals has increased until it is now about thirty per cent of the contested cases. There seems to be no way of stopping the initiation of litigation, which is evidently the outcome of the national character, but the government finds it necessary to decrease the volume of appeals in petty cases in order that the higher courts may be able to give proper attention to really important matters. To allow such appeals, when the lower courts are of good character, tends more to the oppression of poor suitors by rich ones than to secure the rights of the feeble,

and reforms are now proposed which shall effect a prompter administration of justice.

INTERESTING GLEANINGS.

LONDON has 70,000 professional beggars. The second city in size of the British Empire is Calcutta.

STERLING is derived from the name by which the dwellers in eastern Germany were known in the twelfth and thirteenth centuries—they were called Easterlings. The purity not only of their money was very famous, but that of their silver specially so, and coiners and silversmiths were fetched from those parts to improve the quality of English manufacturers. So far back as 1597 two counterfeiters, who sold spurious silver articles bearing a simulated royal lion and the goldsmiths' marks, were sentenced to stand in a pillory at Westminster, with their ears nailed thereto, and with papers above their heads setting forth the nature of the offence for which they were so disgraced. After this degradation they were publicly marched to Cheapside, put in the pillory there, and had each one ear cut off, finally being conducted back to the Fleet Prison and having to pay a fine of ten marks each. It seems that in recent times the record price for Elizabethan silver was £70 10s. per ounce. For old articles in this metal the sum usually obtainable ranges from £5 to £17 per ounce, according to the artistic workmanship displayed on them.

THE word "God" never appeared in any government act until the year 1864, when, at the suggestion of the director of the mint, ex-Governor Pollock, of Pennsylvania, "In God We Trust" was stamped on the copper two-cent piece. Before that time "E Pluribus Unum" had been the motto. Strange to relate, "E Pluribus Unum" on coins never was authorized by law.

LITERARY NOTES.

THE March issue of THE INTERNATIONAL MONTHLY (The Macmillan Company) contains an article by W. W. Ireland on "Degeneration, A Study in Anthropology;" Prof. Patrick Geddes writes on "John Ruskin, as Economist;" Prof. W. P. Trent writes on "Some Recent Balzac Literature." There also is an article on "Henry Irving" by Clement Scott, and one on the "Southern Question" by E. P. Clark.

THE AMERICAN MONTHLY REVIEW OF REVIEWS for March discusses the war in South Africa in its

various phases, the Hay-Pauncefote treaty, the Puerto Rican tariff, our situation in the Philippines, the steamship subsidy bill, the Kentucky disorders, Governor Roosevelt's administration in New York, the approaching presidential campaign, and many other timely topics,

THE complete novel of the March "NEW LIPPINCOTT" is significantly named "The Shadow of a Man." It is by E. W. Hornung, who has made a new success with each new story. "The Shadow of a Man" will doubtless win him fresh laurels, for it is compact, clear-cut, and thrilling, with a love romance that runs through it and binds together the threads of romance. The heroine is a daring rider, who discovers an old convict in a maze of the "bush," and this solves a mystery which clears her lover. Seldom has "LIPPINCOTT" put forth a story so fully realizing its promise of a brief complete novel with living interest in every word.

This number also has a group of most interesting papers, each bearing upon some up-to-date topic: "Where Washington still Lives" is by Rufus Rockwell Wilson, "Two Noble Dames Buried in Westminster Abbey" is by the daughter of the Dean of Westminster, Mrs. Murray-Smith; "A Letter to Artists," especially women artists, comes from the authoritative pen of one of the foremost of American women artists, Mrs. Anna Lea Merritt. In briefer form this was read at the Women's Congress in London, last summer.

THOUGH "The Biography of a Grizzly" and "The Autobiography of a Quack" have run their course in the CENTURY, Dr. Weir Mitchell and Ernest Seton-Thompson are both contributors to the March number of that magazine. Mr. Seton-Thompson begins a study of "The National 'Zoo' at Washington," in which he shows wild animals to be as interesting in captivity as in their natural state of freedom. His text is, of course, fully illustrated. Dr. Mitchell, in "Dr. North and his Friends," presents the opening chapters of the most important serial he has written since "Hugh Wynne." It is a novel embodying the results of a long life of observation, reflection, and experience. A study of Robert Herrick, by Thomas Bailey Aldrich, sketches the poet's life, and claims for him a unique position in English literature as "a great little poet." The life of the laboring class is the special theme of Richard Whiting's Paris article this month, the title being "Paris of the Faubourgs;" and Castaigne's pictures throw vivid sidelights on the subject. Frederick A. Cook, continuing his account of the Belgica Antarctic Expedition, writes of "The Giant Indians of Tierra

del Fuego." King Charles's ill-starred reliance on the Scots, after Naseby, and his imprisonment by Parliament, are the topics considered by John Morley in his study of Oliver Cromwell. "Talks with Napoleon," from O'Meara's newly discovered and intimate St. Helena diaries, are continued, the possibility of escape being one of the most interesting questions considered. Fiction is furnished by H. B. Fuller, Catharine Young Glen, and Eva Wilder Brodhead; poetry by John Burroughs, R. H. Stoddard, J. V. Cheney, Arlo Bates, and others.

THE LIVING AGE announces a four-part story, called "Misunderstandings," translated from the French of Madame Blanc, which begins in the number for March 3. The "misunderstandings" referred to arise from the free and unconventional conduct of an American girl in Paris, and the story is, in effect, a new "Daisy Miller" from the Parisian point of view.

THE frankest as well as the most comprehensive and statesmanlike view yet published of our foreign policy is that of the Hon. Richard Olney, appearing in the March *Atlantic Monthly*. It is marked by Mr. Olney's power of trenchant and compressed expression, yet it is also moderate and far-seeing. The recent movement among Indiana Democrats to nominate Mr. Olney for the Presidency gives additional interest to this paper.

THE leading article of the March number of *Scribner's Magazine* is H. J. Whigham's second article on the Boer War, this one dealing with the fights made by Lord Methuen's division in its progress from the Orange river to the Modder river. Mr. Whigham describes three battles, and this is the first continued magazine account of that campaign to be published. His own photographs and his own maps make perfectly clear to the general reader what has heretofore appeared as merely fragments of news in the daily press. The strategy, as well as the adventure of the campaign, appear clearly in Mr. Whigham's writings. The third "Cromwell" by Theodore Roosevelt deals with the second Civil War and the death of the King. Governor Roosevelt makes an interesting comparison between the conditions prevailing at the end of the English Civil War and at the end of our own Civil War when even the Republican party was divided. The author also points out how the religious element entered into everything done by Cromwell, "mixing curiously with his hard common-sense and practical appreciation of worldly benefits." The illustrations are on an elaborate scale, and represent some of the very best work of English and of American artists.

WHAT SHALL WE READ?

The Criminal; his Personnel and Environment, is a scientific study by August Drähms, resident chaplain of the California state prison at San Quentin, which has just been published by The Macmillan Company, with an introduction by Cesare Lombroso.

The author gathers his material from a wide range of both speculative and experimental observation, as the moral instructor of one of the largest institutions of the kind in the world, and the work is replete with data and rich in observations especially valuable to the student of abnormal and sociological and moral phenomena.

Home Nursing is the title of a useful little book on modern scientific methods for the sick room, by Miss Eveleen Harrison, which is just issued by The Macmillan Company.

In this little work the simplest methods for hygienic nursing have been given, including free ventilation, perfect cleanliness, care of the sick room, fever nursing, the best form of nourishment and many other suggestions, which may easily come within the reach of every home, no matter how modest or simple it may be. All technical terms have been purposely excluded, so that the directions may be easily understood by every one, and only the simplest home remedies have been recommended in the absence of, or while awaiting the arrival of the family physician. As food plays such an important part in disease, the last few pages have been devoted to the diet of patients suffering from various ailments; and some simple recipes in preparing dainty dishes to tempt the appetite during convalescence.

Leo Dayne, a novel of the common people, by Margaret Augusta Kellogg, has recently been published by James A. West Company, Boston. It is a lengthy work, of over 500 pages, and while its publishers prefer to send it out on its own merits, without expressing their personal large belief in it as a permanent addition to American works of its class, still they quote with approval the words of a widely known doctor of philosophy, of Cambridge, who read it carefully in manuscript, and who expresses his "astonishment and delight in the extraordinary excellence of the whole work," recognizing "its power and beauty as a work of art."

In his work on *Economic Crises*, which The Macmillan Company publish, Mr. Edward D. Jones maintains that the individual business concern has not developed controlling and directing power in a degree commensurate with the great increase of

markets during the past century, and that in consequence competition begets industrial rout similar to that in an inadequately organized army under unusual strain. Among the subjects with which this book deals are Industrial Equilibrium—The Organization of Industry—The Connection Between Crises and the Accumulation and Use of Capital—The Influence of Recent Changes on the Remuneration of the Wage-earner. Another and hitherto little developed side of the subject is dealt with in the chapter on "The Psychology of Crises."

An Outline of Political Growth in the Nineteenth Century, by Edmund H. Sears, A. M., Principal of Mary Institute, St. Louis, Missouri, has been written with a view to covering the entire political field and giving a succinct account of every nation which is, even supposedly, under popular government. It therefore attempts what has never been undertaken before. It shows with considerable detail the course of political events the world over for a hundred years; and at the same time its treatment is so far philosophical that it will help the reader to understand whether or not democratic institutions are proving themselves a failure. An extensive bibliography is given at the end of the volume. Published by The Macmillan Company.

JACK LONDON is a name which has been appearing for some time with increasing frequency in periodical literature. It is that of a very young man who promises to take a prominent place among American writers of romance and adventure. His experience has been such as to eminently qualify him for success in this field. At fifteen he began his career as a connoisseur of the romance of real life, knocking about the docks and waters of San Francisco Bay. At seventeen he went to sea before the mast. Out of his personal experience ashore he has vouched for the accuracy of Josiah Flynt's pictures of life "on the road." His Klondike experiences and observations furnished the material for *The Son of the Wolf*, a book of short stories abounding in graphic description and virile narrative which will be brought out this month by Houghton, Mifflin & Co. The book reveals one of the author's strong beliefs: that the Anglo-Saxon is the salt of the earth and bound to be the master thereof, albeit the Slav may object thereto and seek to make his objection valid by force of arms.

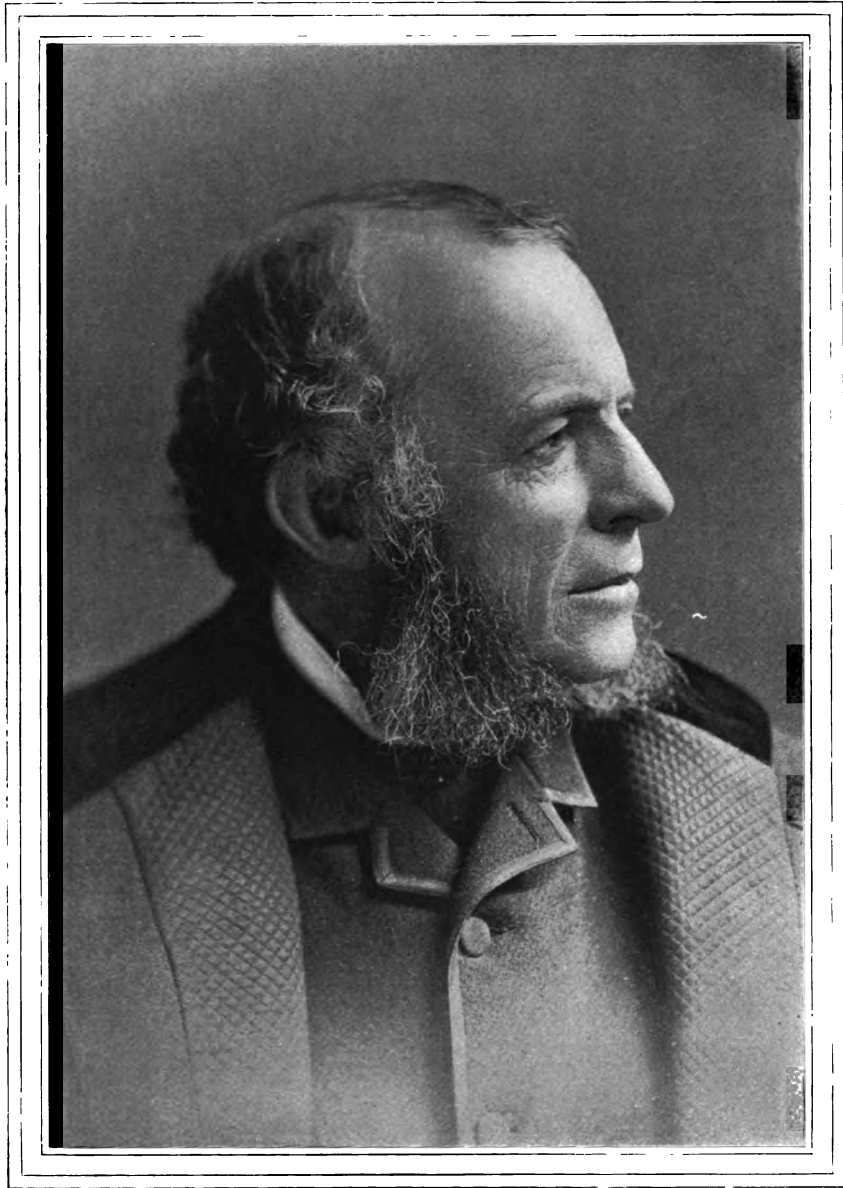
A Friend of Cæsar is the title of a historical novel, by William Stearns Davis which The Macmillan Company have just issued. The story which is laid in Rome, begins when Julius Cæsar is just rising into power, and ends with his great victory and the

establishment of his empire. It is a novel of wide scope, vigorously written, and the author has attempted to put the reader on an intimate footing with the people of the Rome of Cæsar's days. The plot is stirring, as a truthful portrayal of such times would hardly fail to make it; it shifts from a Roman country house to the capital and thence to Syria and Egypt.

THE first important book on the Anglo-Boer War from the standpoint of an Englishman strongly opposed to the policy of the English government has just been published by The Macmillan Company. It is called *The War in South Africa; Its Causes and Effects*, and is by J. A. Hobson who was recently the correspondent in South Africa for the Manchester Guardian. There are many Americans who are firmly convinced that this war is not only unnecessary but essentially unjust, but who have no reliable data with which to fortify their beliefs. Mr. Hobson's book is a sober, restrained account of the whole business by a trained observer.

THE author of *Knights in Fustian*, a story of "Copperhead" plotting in Indiana during the war for the Union, is a young woman, native to the scenes of which she writes. Caroline Brown is one of the names frequently seen in the lists of contributors to periodical literature, but *Knights in Fustian* is her first large essay in fiction. The book has an effective descriptive quality, a strong native insight into human nature, and a grasp of character unusual in a new writer. Humor is said to be lacking in the feminine literary equipment. Of Miss Brown this is not true, for the humorous element is well in evidence in *Knights in Fustian*; and in an episode in the love story, in which the hero seems to neglect his sweetheart, the humor of the situation is developed to the fullest extent. The volume is published by Houghton, Mifflin & Co.

Notes on the Bacon-Shakespeare Question, by the Hon. Charles Allen, just published by Houghton, Mifflin & Co., is a digest of the evidence, direct and indirect, bearing on the authorship of the plays and poems attributed to Shakespeare, from every available Shakespearean student, commentator, and editor, and a minute study of the legal terms used by Shakespeare and by contemporary writers. It is shown by the study of the terms that so learned a jurist as Bacon could not have written into plays and poems such poor legal knowledge as Shakespeare displays. As Judge Allen sums up, Shakespeare was a great dramatist but an ordinary, not to say very poor lawyer, while Bacon, great in the law, was, as shown by his own works, a great jurist but no poet.



EDWARD J. PHELPS.

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EDWARD J. PHELPS.

BY HON. SIMEON E. BALDWIN.

EDWARD J. Phelps, who died at New Haven on March 9, 1900, may fairly be classed among the great American lawyers of his time.

His professional training was of the best. After graduation from Middlebury College, he entered the Yale Law School in 1840, and afterwards completed his legal education at Middlebury in the office of Horatio Seymour, who had served two terms in the Senate of the United States.

His father, who had been upon the supreme bench of Vermont, and then returned to the bar, was also at this time and for many years afterwards in the senate of the United States. The son commenced practice under his auspices at Middlebury, but soon transferred his office to Burlington, which was his home for the remainder of his life.

In 1851, he became second comptroller of the treasury under the Fillmore administration, and while residing then at Washington availed himself of the opportunities which it afforded for increasing his knowledge of international law. A friend who was the law clerk of the State department, came to him one day in deep perplexity. The great statesman who was then at his head had asked him to prepare a dispatch on a somewhat difficult subject of diplomacy, and he was at a loss where to go for his materials. Mr. Phelps offered to relieve him of the task, and after a couple of days' work in the libraries produced a State paper which promptly, and without a word of alteration, received the signature of Daniel Webster.

Mr. Phelps was born and bred a Whig, and

when that party faded out of existence, was among those of its number who allied themselves with the Democratic party. This debarred him from political preferment at the hands of his fellow-citizens in Vermont, though he was sent, on account of his peculiar fitness for the position, as a delegate to the constitutional convention of 1870. Later, he was also put in nomination by the Democratic party as its candidate for governor and for United States senator.

In July, 1878, the call was issued which resulted in the formation, a month later, of the American Bar Association. Among the fourteen names which were signed to it was that of Mr. Phelps. He was now a leader, if not the leader of the Vermont bar, and often appeared in important causes in adjoining States. In the following year he delivered the annual address before the association, taking for his subject, "Chief Justice Marshall and the Constitutional Law of his Time." The masterly manner in which it was discussed, as well as his grace of manner and delivery captivated his audience, and its publication established his position and gave him a national reputation as one of the great lawyers and the great orators of the United States. In 1880, he was elected president of the association, and in 1881 he was appointed Kent Professor of Law at Yale University.

For some years before this, Mr. Phelps had not cared to maintain any office for the transaction of legal business; but this did not prevent him from accepting retainers in important causes, particularly in those before

the courts of the United States. His university duties kept him at New Haven from January to June in each year, but as they only occupied two or three days a week, he often found time to visit New York for legal consultations, where he held the relation of counsel to a leading firm at the bar; and during the year, made occasional arguments, not only there and before the Supreme Court at Washington, but in distant circuits in the west or south.

Before his appointment at Yale, he had accepted the position of Professor of Medical Jurisprudence in the University of Vermont, and he delivered a course of eight lectures there on that subject in April, 1881, which were stenographically reported and printed for the use of the medical class. They make a book of a hundred pages, and are marked by the clearness, discrimination, and grace of composition which characterized everything that fell from his lips.

At the bar, on the platform, and as a law teacher at New Haven, whether before the college seniors, in giving them a general introduction to the knowledge of legal institutions, or the law school classes in explaining the intricacies of equity, he always maintained these qualities of expression. No one failed to understand him as he meant to be understood. No one heard him without being personally attracted to him. There was a charm in the way he spoke, no less than in what he said. He had that just sense of proportion, so rare in lawyer and teacher, and yet so essential to each. He did not talk over the heads of his classes. He did

not weary their attention with needless detail, nor hide the principles he sought to put before them in a cloud of exceptions, or fog of criticism.

In 1885, he went to London as Minister of the United States at the Court of St. James. Few who have filled that post have met with as warm appreciation and sincere respect from the English people; none with more. He was true to the interests of his own country, without offending those against whom he might have to contend in diplomatic negotiations. His wit and eloquence lent brilliancy to his occasional addresses, and in social circles he was everywhere a welcome guest.

Subsequently he took an important part in the Behring Sea Arbitration proceedings at Paris, as one of the counsel for the United States. His own college, the University of Vermont, and Harvard successively conferred upon him the degree of LL. D. He needed no such testimony from Yale that he was held in honor there.

He was attacked by pneumonia shortly after the opening of the winter term at Yale, and died after an illness of eight weeks, at the age of seventy-seven, but up to the time it seized him, "his eye was not dim, nor his natural force abated."

His name will always remain associated with the work of legal instruction at New Haven, from its attachment to the Edward J. Phelps professorship in the law department of the university, a foundation established several years since under that designation, by one of his special friends, J. Pierpont Morgan of New York.

**WAR CLAIMS ARISING FROM THE AMERICAN OCCUPATION OF
THE PHILIPPINE ISLANDS.**

BY W. F. MORRIS, COUNSEL FOR THE GOVERNMENT, MANILA.

LEGAL questions of a very interesting character, are frequently presented for solution before the board of officers, now sitting in the city of Manila, for the purpose of passing on claims against the United States arising from our occupation of these islands.

As might be expected, claimants of all classes came before the board, asking for relief, in amounts varying from \$100 to over \$100,000. A poor native woman prays compensation for a Cariboo cow, or her little stock of silver, stolen by American soldiers or native ladrones. A rich Chinaman or an English company demand damages for a distillery or a warehouse with its contents destroyed by fire. Claims of the latter class involve some very interesting, as well as intricate legal questions of a political as well as judicial nature, as well illustrated by the case of Louis Aaeng Vismanoz Ong Queco, now pending before the board of claims.

The claimant referred to is a Chinaman, born in Amoy, still owing allegiance to the Empress of China, although most of his life has been passed in these islands. (It may be well to remark here, that the laws of Spain prohibited a Chinaman from becoming a Spanish subject.) The distillery of which he was owner was situated in a suburb of the city of Malolas, known as the Barrio of Taglag, and on a small stream called the Taglag river. On the 31st of March, Malolas was captured by our troops, and in a large measure destroyed by fire during the engagement, the suburb of Taglag remaining uninjured. After the capture of the city a guard was posted at a bridge over the river, in the immediate vicinity of the distillery. The presence of this guard served as a protection to the building. On the 27th of April, a general advance was ordered by General Mc-

Arthur; as a consequence the guard was removed to a point some three miles distant, and, shortly after, the distillery was burned to the ground, either by ladrones, the criminal class of the community, or by United States soldiers, acting with or without the authority of their superior officers. Shortly before the destruction of the building, the commanding officer of the troops stationed at the bridge had been requested to place a guard for the protection of the distillery, which he had declined to do, for the reason that he could not spare the men. A large quantity of vino, or high wines, stored in the building, the property of the owner of the distillery, was destroyed by the commanding officer, for the reason that the same was producing drunkenness and disorder, the building and its contents having been abandoned by the owner and his employees, the people having in consequence free access to the liquor.

The owner of the property comes before the board with a claim of \$100,000 based on the existence of a state of facts, substantially as above set forth, the question to be determined being: Is an alien resident of the Philippine Islands entitled to recover damages from the United States, for his property, destroyed during active military operations, either by the insurgents, or our own troops, the latter acting with or without the orders of their superior officers?

We think the following well established as propositions of international law: That for his property destroyed in "the track of war" a citizen of neither belligerent can recover compensation; that in this respect the status of a resident alien is the same as that of the citizen, possessing the same rights of recovery and no more; that no cause of ac-

tion against the United States, for such loss exists in favor of either citizen or alien resident; that no national liability is incurred by the United States; that the United States is not responsible to its own citizens for the injury or destruction of their property caused by its military operations. See *U. S. v. Pacific Railroad Co.*, (120 U. S. Rep. page 227) in which the court referring to the late Civil War uses the following language, "The war, whether considered with reference to the number of troops in the field, the extent of military operations, and the number and character of the engagements, attained proportions unequalled in the history of the present century. More than a million of men were in the armies on either side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the government. By the well-settled doctrine of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways, in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the enemy, as the breaking up of roads, or the burning of bridges, or would cripple or defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed it was his imperative duty to direct their destruction. The necessities of war called for and justified this. The safety of the State in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex*."

To sustain its position, the court refers to three cases, in which relief was sought through congressional action, one occurring in the Revolutionary War, one in the war of 1812, and the other during the late Civil War. Each of these cases presented a strong

equity in favor of the claimant. In the earliest case, that of Mr. Frothingham, the petitioner asked compensation for the loss of a dwelling-house belonging to his mother, situated in the city of Charleston, which was burned by order of General Sullivan, as a matter of military necessity. The committee appointed by Congress to investigate the claim reported adversely, and no further action was had in the matter. A similar report was made by a congressional committee appointed by the 17th Congress appointed to investigate and report upon the claim of a Mr. Villiers of Louisiana, for damages sustained by his plantation, by reason of cutting through a levee in its vicinity. The act complained of was done by order of General Morgan, commanding the Louisiana militia, to prevent the British invader from bringing his cannon to the city of New Orleans.

The third claim was by one J. Milton Best, for the value of a dwelling-house situated in Paducah, Kentucky, destroyed by order of the commanding officer of the Union forces, under urgent military necessity. The claimant was a man of undoubted loyalty, who had rendered valuable service to the Union cause. The bill for the relief of Mr. Best passed Congress, but was vetoed by President Grant. In his message to the Senate the president, after speaking of the claim as one for compensation, on account of the ravages of war, and observing that its payment would invite the presentation of demands for very large sums of money against the government for necessary and unavoidable destruction of property by the army, said: "It is a general principle of both international and municipal law that all property is held subject not only to be taken by the government for public uses (in which case, under the constitution of the United States, the owner is entitled to just compensation), but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal

obligation on their part to compensate the owner. The temporary occupation of, injuries to, and destruction of property caused by actual and necessary military operations, is generally considered to fall within the last mentioned principle. If a government make compensation under such circumstances, it is a matter of bounty rather than of strict legal right."

For losses accruing to private individuals, by the destruction of their property as a result of active military operations, in the three great wars in which our country has been engaged, the same principle has been enunciated; "That for injuries to, or destruction of private property in necessary military operations, the government is not responsible." No cause of action exists against the United States; compensation if granted at all, is as a matter of bounty.

The same doctrine was announced by the United States Supreme Court at an early day. (See 1 Dallas, page 176.) The action was for recovery of damages for flour, which by order of Congress had been taken from the owner and placed in supposed safety; subsequently it was captured by the British. Held that no recovery could be had, the original removal or the flour being considered necessary as a military measure.

The legal principle governing this class of cases is thus announced by a great master of international law: "Damages are of two kinds: Those done by the State itself, and those done by the enemy. Of the first kind, some are done deliberately and by way of precaution, as when a field, house, or garden belonging to a private person is taken for a special military purpose, or when his standing corn or store house is destroyed, such damages are made good to the individual . . . but there are other damages, caused by inevitable necessity: as, for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents, they are misfortunes which chance deals out to the proprietors on whom they

happen to fall. The sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it, but no action lies against the State for misfortunes of this nature, — for losses which she has occasioned, not willfully, but through necessity and mere accident, in the exertion of her rights. The same may be said of damages caused by the enemy. All the subjects are exposed to such damages; and woe to him on whom they fall. The members of a society may well encounter such risk of property since they encounter a similar risk of life itself. Were the State strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted, and every individual in the State would be obliged to contribute his share in due proportion, a thing utterly impracticable." (Vattell, book 3, chapter 15, page 402.)

Modern nations have not yet risen to the high moral plane of Vattell where, as quoted above, he recommends the payment for private property destroyed, as standing corn or a store house that happens to be in the "track of war."

That an alien resident is not entitled to greater privileges than the citizen of a country in a state of war or insurrection, and that no liability is incurred by the government of the alien resident for the loss of his property, is laid down by Mr. Seward in diplomatic correspondence with the Austrian minister, in which he uses the following language: "It is believed that it is a received principle of public law, that the subjects of foreign powers domiciled in a country in a state of war are not entitled to greater privileges or immunities than the other inhabitants of the insurrectionary district. If, for a supposed purpose of the war, one of the belligerents thinks proper to destroy neutral property, the other cannot legally be regarded as accountable therefor. By voluntarily remaining in a country in a state of civil war they must be held to have been willing to accept the risks as well as the advantages of that domicile.

The same rule seems to be applicable to the property of neutrals, whether that of individuals or of governments, in a belligerent country. It must be held to be liable to the fortunes of war. In this conclusion the undersigned is happy in being able to refer the Austrian government to many precedents of comparatively recent date, one of which, a note of Prince Schwartzberg, of the 14th of April, 1850, in answer to claims put forward on behalf of British subjects, who were represented to have suffered in their persons and property in the course of an insurrection in Naples and Tuscany." It may be well to call particular attention to the fact that the Austrian government denied responsibility for property of British subjects destroyed in the course of an insurrection, in which belligerent rights had not been granted by foreign powers to the insurgents, as we understand was the case in the insurrection in Naples and Tuscany against the Austrian government referred to by Mr. Seward. The above correspondence is found in a letter from Mr. Seward, Secretary of State, to Mr. Wydenbruck dated November 16, 1865, MSS. notes, Austria.

To the same effect is a letter from the Secretary of State, to Mr. Barreda representing the Peruvian government, referring to a claim of certain citizens of Peru, for the value of certain property destroyed in 1862, by insurgents. "The United States government is not liable for loss to Peruvian citizens caused by the destruction of their property on board a ship in Chesapeake Bay, in 1862, such destruction being effected by a sudden attack of insurgents, which could not by due diligence have been averted by the government of the United States." (Mr. Seward, Secretary of State, to Mr. Barreda, January 9, 1863, MSS. notes, Peru.)

That alien residents have the same status as citizens, and no greater rights, and that no national liability is incurred for losses sustained by them on the part of the belligerent inflicting the loss, when it occurs as the re-

sult of military operations, is shown by the language of Secretary of State Bayard, as follows: "However severe may have been the claimant's injuries, it must be recollected that like injuries are committed in most cases where towns are sacked, and that aliens resident in such towns are subject to the same losses as are citizens. It has never been held, however, that aliens have for such injuries a claim on the belligerent by whom they are inflicted. On the contrary the authorities lay down the general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of the State." (Mr. Bayard, Secretary of State, to Mr. O'Conner, October 29, 1885, MSS. Dom. Let.)

That there is no national liability to make compensation to the alien owner, for property destroyed in the necessary prosecution of hostilities, has been explicitly declared by the English government, as shown in the following correspondence of Mr. Fish, Secretary of State, in which the government of the United States adopts the same principle. The correspondence is in regard to the claim of a Mr. Ravenscroft, a British subject, against the United States, for damages sustained through loss of property during the late Civil War. Mr. Fish in denying the responsibility of his government makes reference to the doctrine laid down by the English government as to losses sustained by its subjects resident in France during the Franco-Prussian War, in the following language: "Nor does the fact that Mr. Ravenscroft is a subject of Great Britain in any way affect his claim to compensation being a resident within the seat of war. At the time of his alleged losses he was equally with the citizens of the country, subject to the fortunes and incidents of war. Earl Granville with his usual clearness applies this principle to the case of Mr. Kirby, an English gentleman, residing at La Forte, Imbault, in France, during the late Franco-German War. The German forces had appropriated much of that gentleman's property

for military purposes, and he sought the interposition of his own government to enable him to obtain compensation or indemnity for his losses. Lord Granville replied to his application by saying that "it is out of their (the governments') power to interfere to obtain any redress for him, inasmuch as foreigners residing in a country which is the seat of war are equally liable with the natives of the country to have requisitions levied on their property by the belligerents." In another case his lordship says, "that her Majesty's subjects, resident in France, whose property has been destroyed during the war, cannot expect to be compensated on the ground of their being British subjects for losses which the necessities of war have brought upon them in common with French subjects."

And in still another case, that of the English residents of Chantilly, his lordship instructs Mr. Odo Russell, in presenting their case for the consideration of the Emperor of Germany, to state, "that her Majesty's government make no claim for the petitioners to be exempted, as British subjects, from the evils incident to a state of war, to which all other persons resident in France are exposed." These views are in full accord with the long established and well understood rules which the necessities and exigencies of war give rise to. However much they may be modified in practice by the enlightened and humane spirit of modern times, the rules which govern the conduct and rights of belligerents in such emergencies are not changed." (Mr. Fish, Secretary of State, to Mr. Thornton, May 16, 1873, MSS. notes, Great Britain.)

The same doctrine is emphatically declared by Mr. Frelinghuysen, as Secretary of State, in diplomatic correspondence with the Belgian government. "The property of alien residents, like that of natives of the country, when 'in the track of war,' is subject to war's casualties, and whatever in front of the advancing forces that either impedes or may give them aid when appropriated, or which, if left unmolested in their rear, might afford

aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents, and no liability whatever is understood to attach to the government of the country, whose flag that army bears, and whose battles it may be fighting, and when actual, positive war is in progress the commander of the armies in the field must be the judge of the existing exigencies and necessities which dictate such action. This is believed to be the universal rule at the present day; it is that which has been followed by the governments of Europe in the recent wars. In the case of the Franco-Prussian War of 1870-1871, Earl Granville, then Secretary of State for foreign affairs of Great Britain, adhered to this rule in regard to British subjects resident in France, during the time of the Prussian invasion of France, and it is known that British subjects then resident in France, and who were in the track of the war, lost property to the amount of many millions of dollars." (Mr. Frelinghuysen, Secretary of State, to Mr. Boudier de Melsbroeck, April 17, 1883, MSS. notes, Belgium.)

It is sometimes very difficult to arrive at a satisfactory decision in the investigation of claims before the board, owing to the insufficient and sometimes conflicting evidence. The witnesses are generally Philipinos, Chinese, or a half class called here, Mestizos, all of whom speak the Spanish language with more or less facility. It is very difficult to obtain an efficient interpreter. Owing to these conditions, the testimony is frequently of a very unsatisfactory character. In the case under consideration, a portion of the evidence tends to show that the fire was set to the distillery by the unauthorized acts of soldiers sent to destroy the vino contained therein. This, however, is positively denied by the sergeant in charge of the detachment, but if proven, the fact would not fix the liability upon the government. That the United States is not liable for the unauthorized or wanton acts of its troops, reference is made

to the opinion of Alexander Hamilton, as stated in these words: "According to the laws and usages of nations, a State is not obliged to make compensation for damages done to its citizens by an enemy or wantonly or unauthorized by the troops." (Report of Mr. Hamilton, Secretary of Treasury, November 19, 1792.) While not in sympathy with the law as above set forth, the doctrine not only receives the high sanction of Mr. Hamilton, but the judge-advocate general in the following language expresses the same opinion: "For criminal or tortious acts committed by soldiers against the property of citizens, the United States is not responsible. The remedy is by prosecution of the individual offender, or suit for damages." (Vol. 38, page 319.) "The United States is not responsible for unlawful acts of its soldiers or employees, and the secretary of war is not

empowered to allow a claim for personal property stolen or illegally appropriated by a soldier." (Id. vol. 33, page 165.) From the foregoing judicial decisions and diplomatic utterances, it seems clear that for property of citizens or alien residents, destroyed in the track of war, "no cause of action lies against either belligerent; that, if made at all, compensation is a matter of grace and not of legal right.

The great number of claims against the government, arising from the American occupation, are of the general character of the one constituting the basis of this article. While some may present equities calling for a certain compensation from congressional action, as a matter of bounty, few, if any, of the great war claims, aggregating millions of dollars, constitute a legal claim against the United States.



THE ATTORNEY IN THE POETS.

II.

THE "game" of the Church, the revenue of a bishopric, were indeed "more substantial" than the poor allowances to the attorneys which escaped the taxing master's censure. But Churchill seems to have judged the class less severely than his contemporaries, and even recognized that they might suffer injustice. He praised Judge Reason (and by implication denounced other judges) because she had not

— basely to anticipate a cause,
Compelled solicitors, no longer free,
To show those briefs she has no right to see.

The anonymous author of the "Probationary Odes for the Laureateship" went further and was willing to allow to one attorney, not indeed virtue, but grammar. Among the persons represented as candidates for the laurel on the death of Whitehead was Sir Cecil Wray, Fox's opponent in the great Westminster Election of 1784. But though the words of the ode were stated to be by Sir Cecil, it was announced that "the spelling" was by Mr. Grojan, Attorney-at-law. Mr. Grojan, a practitioner in Chancery Lane, was Deputy High Bailiff for Westminster; hence, doubtless, his association with the candidate, and his presence in the queer company which ranged from the Chancellor and the Archbishop of York to Michael Angelo Taylor and Dr. Pretymann. Mr. Pepper Arden, Attorney-General, too, was of the party and sang:

Indite, my Muse, indite! subpœna'd is thy lyre.
The praises to *record*, which *rules of Court* require.

But in revenge for the distinction allowed to Mr. Grojan, his official principal, the High Bailiff, from whom Fox recovered swingeing damages for his conduct in the scrutiny, is represented as unable to frame a sentence correctly.

With the beginning of the nineteenth century a more charitable view dawned upon mankind. Even in its worse days the profession must, somehow, have retained some respect, and now, bad as was its general character, there were exceptions admitted. To say that a man was an attorney was now only *prima facie* evidence that he was a villain; in the time of Dr. Johnson, as declared by the witticism of which he was pleased to be reminded, it had been conclusive proof.

When Crabbe with fear and trembling described the profession in *The Borough*, his principal example was, indeed, an unfavorable specimen; but there was a contrast afforded in honest Archer. Swallow was bad—"a hard bad man who prey'd upon the weak."

Lo! that small office! there th' incautious guest
Goes blindfold in, and that maintains the rest:
There in his net th' observant spider lies,
And peers about for fat intruding spies.

Swallow's villainies consisted in recovering a house from his father on behalf of a client, inciting clients to litigation, after giving them a generous dinner ("his way to starve them was to make them eat") and lending money on expectant interests. This last practice, not criminal in itself, led on to worse courses. With an hypocrisy doubtless natural in his profession, Swallow joined a Chapel, became treasurer, and declined to part with the funds he received on the ground that as some subscribers were dead, there was no one who could give him a valid discharge. And this sad course of conduct, the poet appeared to think, was the necessary consequence of legal training. The young attorney loses heart.

Law, law, alone forever kept in view,
His measure guides and rules his conscience too.

Since they live by law, they incite to litigation. When the client's fierceness abates "these artists blow the dying fire, and make the embers glow." The process stops only when the client is exhausted.

But Crabbe admits exceptions. There were honorable men in the profession. These were the well-to-do,

"Who hold manorial courts,
Or whom the trust of powerful friends supports."

An eighteenth century poet could not have made such an admission as this; and the "Pope in worsted" went further still:

Yet I repeat there are who nobly strive,
To keep the sense of moral worth alive.
Men who would starve, ere meanly deign to live
On what deception and chican'ry give;
And these at length succeed, they have their strife,
Their apprehensions, stops, and rubs in life;
But honor, application, care and skill
Shall bend opposing fortune to their will.

Of such is Archer, he who keeps in awe,
Contending parties by his threats of law;
He, roughly honest, has been long a guide
In Borough-business, on the conquering side;
And seen so much of both sides, and so long
He thinks the bias of men's mind goes wrong:
Thus, though he's friendly, he is still severe,
Surely though kind, suspiciously sincere;
So much he's seen of baseness in the mind
That while a friend to man, he scorns mankind.

Sixteen years later, when the second year of the century was beginning, this more favorable view of the attorney received confirmation from within the legal profession. Crabbe was a clergyman, and had been an apothecary; an anonymous member of the Bar came now to corroborate the other professions. He pictures the opening of Term:

From Court to Court, perplexed, attorneys fly,
A Dowling each! quick scouring to and fro,
And wishing he could cut himself in two,
That he two places at a time might reach,
So he could charge his "Six and eight pence each."

This is but natural weakness, and the author alludes to it, not in reprehension, but with the pride of superiority. As six-and-eight is

to one, three, six, so is an attorney to a member of the Bar. The author beholds the attorney again at the assizes, "bustling, hawk-eyed." There the attorney may have the ill-luck to find Scarlett against him and receive "a roasting."

"What!" some old practised *limb* is apt to cry,
When such a "roasting" meets his curious eye,
Can all this difference be betwixt a leader
And an obliging smiling special pleader?
I well remember at no distant time,
When Varro thought it neither sin nor crime,
To greet a friend with language soft and kind,
That won his patient client's heart and mind.
But now, behold! when by their friendly aid,
His end is answered, and his fortune made,
Up to the top of fame's proud height he goes
Then kicks the ladder down by which he rose!

Not content with this exposition of his views in verse, the author added a note in prose. "There is an immeasurable distance between a Barrister and an Attorney; and many of the former have, or effect to have, an absolute antipathy to the latter." He refers to Scarlett's habit of vituperating them in Court, which on one occasion led to the leading case of *Hodgson v. Scarlett*, in which it was decided that no action will lie against Counsel for slander uttered in Court. "One may collect at least three good reasons," continues the poet, "why Counsel should be more abstemious in their vituperation of these gentlemen: 1. They (the Barristers) are sure of the protection of the Court. 2. The abused party cannot reply to any observations, however strong that may be made, on his character or conduct. 3. Nor can he have any redress or satisfaction *out* of Court."

The Barrister-poet usually, like Blackstone, bids an early farewell to his muse. While he is still among the singing birds, his practice is small, and he has reason to regard the attorney's as angelic visits. Mr. Justice Hayes, in his "Elegy written in the Temple Gardens," lamented the condition of the briefless in the upper stories.

The grave Attorney, knocking frequently
The bustling Clerk, who hastens to the door,
The bulky brief, and corresponding fee,
Are things unknown to all that lofty floor.

The same theme has inspired the pen of
Mr. Horace Smith. He speaks the very
language of the "obliging, smiling, special
pleader."

Ah! sweet Attorney! I behold
Thy brief so fat and fair;
And on the back is marked the gold
I long so much to share.
Alas! why all thy favor pour
On Robinson, Q. C.?
Ah! deign to bless the second floor
And bring thy briefs to me.

I hear thy step upon the stair!
My heart beats as 'twould burst
Ah me! how vain this foolish fear,
Thou knockest at the first.
Raise, raise thy lovely eyes once more,
Then may'st thou haply see
The name of Figgins on the door,
And bring thy briefs to me.

It is, indeed, one of the common complaints
against attorneys that they are unduly con-
servative and timorous in dispensing such
patronage as they possess. They are blind
to unpractised merit, slow to recognize worth
in the new man. That theme must often
have been sung. Mr. Smith, himself (doubt-
less before he mounted the bench), gave us
another variant of this opinion to the air of
"Three Fishers went sailing."

Three attorneys came sailing down Chancery Lane,
Down Chancery Lane, e'er the Courts had sat,
They thought of the leaders they ought to retain,
But the Junior Bar, Oh! they tho't not of that;
For Sergeants get work and Q. C.'s too,
And Solicitors' sons-in-law frequently do,
While Junior Bar is moaning.

Three juniors sat up in Crown Office Row,
In Crown Office Row, e'er the Courts had sat,
They saw the Solicitors passing below,
And the briefs that were rolled up so tidy and fat.
For Sergeants get work, etc.

Three briefs were delivered to Jones, Q. C.,
To Jones, Q. C., e'er the Courts had sat,
And the juniors weeping and wringing their paws,
Remarked that their business seemed uncommon
flat

For Sergeants get work and Q. C.'s too,
But as for the rest it's a regular "do."
And the Junior Bar is moaning.

But here the attorney is not criticized, but
wooed. While hope still lingers the junior
barrister is not in a position to judge the
attorney impartially, at least, aloud. Mr.
Haynes Bayly, the drawing room darling,
the popular singer of sixty years ago, suffered
no such disadvantage. He had renounced
attorneyship. He seems to have disliked in-
tensely the study necessary for the profes-
sion of the law, and, indeed, he denounced
the profession (though it was his father's, and
doubtless supported *him*) very freely, in the
person of John Quill. Why was Mr. Bayly
so angry? Apparently because he himself
had but narrowly escaped being one of us.
Even then from the son of a solicitor one
might have anticipated a more sympathetic
criticism.

But the animus and flippancy of Butterfly
Bayly were but survivals from the past. A
more humane criticism was proper to the
nineteenth century, and the attorney was no
longer to be considered as a venomous insect,
but to be admitted to belong to the verte-
brates; and, finally, in 1865, the attorney
was definitely admitted within the human
family. The honor of making this admission
belongs to Mr. Cosmo Monkhouse, in his
poem, "John Starkie, Solicitor."¹ In some
two dozen verses John Starkie revealed his
character, and the tragedy of his life — one
leaf from the great human tragedy — just as
a doctor, or estate agent, or poet, might have
done. The poem is a picture of the solicitor,
not as law agent, but as man of sentiment.
John Starkie had loved, and loved in vain;
she had wedded another, just as she often
did in the fluent verse of Mr. Haynes Bayly,

¹ A Dream of Idleness. Moxon, 1865.

and, deeply disappointed, Mr. Starkie plunged into practice, and sought to bury his woe amid his papers. How little, he reflected, the world knows of a man's real character!

If this of most be true, 'tis true,
And doubly true of me,
Whose roots are plunged down deep from view,
Whose blossoms none may see.

A gnarl'd trunk, all seam'd and crost
Of hard and knitted grain;
Whose hopes were bitten by one frost,
And never grew again.

Nor grew, nor died — the sap return'd
And gathered in the roots;
And though in Spring no more it burn'd
Ambitious of green shoots

Yet, east and west, and north and south,
Refresh'd with rain and dew,
The roots sent slender saplings forth,
And none knew whence they grew.

How could they know? I blame not them;
They judge by what they see;
They only see the rough old stem,
And this they take for me.

How can they tell how I have striv'd
To keep my real life
Pure as the life I would have lived
If *she* had been my wife.

They think a lawyer thus must act,
And thus he scarcely can,
But they, methinks, forget the fact
That he, like them, is Man.

The path the toiling foot may tread
Shows not the spirit's goal,
And work which earns the body's bread
Need never stain the soul.

This (though not the end of Mr. Starkie's reflections) is the conclusion of the whole matter. Here is the final crown of the work, the last stage of the long evolution of opinion concerning the attorney. Not always is his nature subdued to what it works in, like the dyer's hand. The work which earns his body's bread need never stain the soul. The attorney, also, even he, like the critics, "is Man."

Here, then, the tale should have its ending. But the poets are like honest Verges—"a good old man, sir, he will be talking." And the true word having been spoken, Mr. Robert Buchanan found himself compelled to fall back upon the legend. Mr. Buchanan was "ever a fighter." He would have made pretty play with his cudgel in the old swashbuckling days; Grub Street would have resounded with his shouts of triumph and the howls of his victims. He costumes his solicitor in the style of the Adelphi, a "villain of half-penny sheets."

Sharp like a tyrant, timid like a slave,
A little man with yellow, bloodless cheek;
A snappish mingling of the fool and knave,
Resulting in the hybrid compound—Sneak.

It is not for the reader to contest Mr. Buchanan's criticism on his own creation; Mr. Thomas Sneak, the respectable solicitor, a man of principle, of means, of regular church-going habits, is not the most probable result of the union of a tramp, with a "half tramp, half pedlar, and whole scamp." Yet such Mr. Buchanan declared his parentage. Mr. Sneak himself explained the position:

Put execution in on Mrs. Hart—
If people will be careless, let them smart.
Oh, hang her children! just the common cry!
Am I to feed her family? Not I.
I'm tender-hearted but I dare be just,
I never go beyond the law, I trust;
I've work'd my way, plotted and starved and plann'd,
Commenced without a penny in my hand,
And never howl'd for help, or dealt in sham—
No! I'm a man of principle, I am.
What's that you say? Oh! *father* has been here?
Of course you sent him packing? Dear, oh dear!
When one has work'd his weary way like me,
To comfort and respectability,
Can pay his bills and save a pound or two,
And say his prayers on Sunday in a pew,
Can look the laws of England in the face.
'Tis hard, 'tis hard, 'tis shame and 'tis disgrace,
That one's own father—old and worn and gray—
Should be the only hinderance in the way.
Swore, did he? very pretty! Threatened? Oh!
Demanded money? You, of course, said "No?"
'Tis hard—my life will never be secure—
He'll be my ruin some day, I am sure.

Mr. Sneak's pride in his profession is very pleasing. Not every one can feel his exultation in being on the roll — "the height on which I stand." But Mr. Sneak had, as he said, more than his fair share of trouble. A prodigal father is a severe trial. Mr. Sneak's mistake, in dealing with the problem, was his attempt to make his father a clerk. An old gentleman of wandering habits, given to potations, and in his cups excessively sentimental, if not maudlin, would upset the discipline of any office. The picture of the old man, fed and clothed by his son, and reproaching him for his baseness in prospering in the world, and especially for ingratitude, possesses a humor which Mr. Buchanan, perhaps, did not realize. Mr. Sneak, senior, was of the race which derided attorneys. Set down to copy documents, he preferred to use his son's foolscap to draw (*inter alia*, as his son would have said):

A shape in black, that kick'd and agonized,
Strung by a pauper to a gallows great
And underneath it written, "*Tommie's Fate!*"

So do the wits repeat their fancies, and Mr. Woty's crowning jest recurs unchanged after the lapse of a hundred years.

More in accord with modern feeling than this outmoded satire is the presentation of a professional man given by Mr. W. S. Gilbert. Mr. Monkhouse first among poets admitted that the solicitor is a man; Mr. Gilbert with penetrating insight goes deeper to the heart of things, and reveals him as a man of feeling and delicacy almost excessive in its refinement. Mr. Gilbert, indeed, refers many times to the profession. He first made known the Solicitor of Ealing, who wedded a fairy; he refers in fitting terms to the fame of Ely Place; but nowhere has he drawn a more careful portrait than that of "Baines Carew, Gentleman;"

BAINES CAREW, GENTLEMAN.

Of all the good attorneys who
Have placed their names upon the roll,
But few could equal *Baines Carew*
For tenderheartedness and soul.

Whene'er he heard a tale of woe
From Client A or Client B,
His grief would overcome him so,
He'd scarce have strength to take his fee.

It laid him up for many days,
When duty led him to distraint;
And serving writs, although it pays,
Gave him excruciating pain.

He made out costs, distrained for rent,
Foreclosed and sued, with moistened eye —
No Bill of costs could represent
The value of such sympathy.

No charges can approximate
The worth of sympathy with woe; —
Although I think I ought to state
He did his best to make them so.

Of all the many clients, who
Had mustered round his legal flag,
No single client of the crew
Was half so dear as *Captain Bagg*.

Now CAPTAIN BAGG had bowed him to
A heavy matrimonial yoke;
His wifery had of faults a few —
She never could resist a joke.

Her chaff at first he meekly bore,
Till unendurable it grew.
"To stop this persecution sore
I will consult my friend CAREW.

"And when *Carew's* advice I've got,
Divorce *a mensâ* I shall try."
(A legal separation — not
A vinculo conjugii.)

"O BAINES CAREW, my woe I've kept
A secret hitherto, you know;" —
(And *Baines Carew*, Esquire, he wept
To hear that BAGG had any woe.)

"My case, indeed, is passing sad,
My wife—whom I considered true—
With brutal conduct drives me mad."
"I am appalled," said BAINES CAREW.

"What! sound the matrimonial knell
Of worthy people such as these!
Why was I an Attorney? Well —
Go on to the *Sacvilia*, please."

"Domestic bliss has proved my bane,
A harder case you never heard,
My wife (in other matters sane)
Pretends that I'm a Dicky Bird!

"She makes me sing, 'Too-whit, too-wee!'
And stand upon a rounded stick,
And always introduces me
To every one as 'Pretty Dick!'"

"Oh, dear," said weeping BAINES CAREW,
"This is the direst case I know"—
"I'm grieved," said BAGG, "at paining you—
To COBB and Polterthwaite I'll go.

"To COBB's cold calculating ear
My gruesome sorrows I'll impart."
"No; stop," said BAINES, "I'll dry my tear,
And steel my sympathetic heart!"

"She makes me perch upon a tree,
Rewarding me with 'Sweetie-nice!'
And threatens to exhibit me
With four or five performing mice."

"Restrain my tears I wish I could"
(Said BAINES) "I don't know what to do."
Said CAPTAIN BAGG, "You're very good."
"Oh, not at all," said BAINES CAREW.

"She makes me fire a gun," said BAGG;
"And at a preconcerted word.
Climb up a ladder with a flag.
Like any street-performing bird.

"She places sugar in my way,—
In public places calls me 'Sweet!'
She gives me groundsel every day,
And hard canary seed to eat."

"Oh, woe! oh, sad! oh, dire to tell!"
(Said BAINES), "Be good enough to stop."
And senseless on the floor he fell
With unpremeditated flop.

Said CAPTAIN BAGG, "Well, really I
Am grieved to think it pains you so,
I thank you for your sympathy;
But hang it—come—I say, you know!"

But BAINES lay flat upon the floor,
Convulsed with sympathetic sob—
The Captain toddled off next door,
And gave the case to MR. COBB.

Here, then "the wheel has come full circle." Where the poets of a century ago saw more greed and villainy the modern seer describes a perfect exemplification of the generous qualities, carefully graduated from the delicate sensibility of Mr. Carew, to the robust helpfulness of Mr. Cobb, and the unassuming but serviceable virtues of Mr. Polterthwaite. An anonymous singer has gone even farther and pictured the solicitor (as in fact he is) not the oppressor, but the victim of his clients.

There was a young lady of Cicester,
Who went to consult her solicitor,
When he asked for his fee,
She said "Fiddle-de-dee,
I only looked in as a visitor."

So the truth prevails, and at last the attorney's virtues are recognized. True this has happened only when Parliament is busy depriving him of his livelihood; but at least truth has prevailed, and doubtless soon from the Bodley Head will proceed a six-and-eight penny Garland for its fuller utterance.



AN ARGUMENT FOR HAMLET.

BY MARY E. CARDWILL.

SHAKESPEARE has offered us in Hamlet a profound psychological study. To do this he has used the instruments so commonly found in his hands, which from his pre-eminently skilful, almost perfect handling should be regarded as peculiarly his own,—soliloquy and supernaturalism?

With the scalpel of soliloquy he here lays bare the anguish of a distracted soul, the workings of a grand intellect in distress, and the writhings of a noble, sensitive spirit on the rack of the cruellest circumstances and most hopelessly untoward events.

With the magic wand of the supernatural he, for our better understanding, embodies in the ghost the more spiritual elements of the prince's character—imagination and intuitive reasoning.

If we were left to the revelations of these two instruments alone, we would perhaps more easily come to a positive, indisputable decision in regard to Hamlet's condition. But his actions and his words to others must also be taken into account. Some of these acts and words are so inexplicable we are forced either to permit them to go largely unexplained or to accept the theory of insanity, real or feigned.

Yet if we admit that there are some things in this complex creation for which no wholly adequate reason can be offered, other than the ever mysterious complexity of human character, we can still discover many strong proofs of Hamlet's soundness of mind; nor need we take even temporary refuge in the theory of feigned insanity.

First in order is the universal sympathy which readers, students and theatre-goers have for Hamlet. This may be thought a sentimental and extrinsic reason, but a slight investigation will show it to be sound and logical. In some measure we judge all men

most satisfactorily by the impression they leave upon our minds. The character of Hamlet has always proved a most fascinating study to lovers of the plays of Shakespeare. What is more important to our argument, every student feels himself able to enter into the peculiar emotions of the Dane, to feel the reality of his sufferings, the righteousness of his anger and the pardonableness of his faults: though each has a somewhat different solution of the perplexities arising from the character.

In the make-up of most men there is a superstitious element, and not a few have permitted themselves to speculate upon the mystery of their connection with the here and the hereafter. Strength of intellect and sensibility lead almost inevitably to periods of doubt, despondency and despair, periods when it seems a serious question whether it is better to

"Bear those ills we have

Than fly to others that we know not of."

Again most men of a high moral sense, and capable of a deep affection have felt the cruel sting of disappointment from the injustice, unkindness, or, worse than all, the sins of those united to them by the closest ties of blood or friendship. Indignation is one of the surest signs of true feeling, but under some circumstances it becomes that fierce anger which Coleridge refers to in his fine, much quoted lines

"For to be wroth with those we love

Doth work like madness in the brain."

Moreover, aside from this sympathy founded on personal experience, many students of Hamlet have a peculiar appreciation of the Prince's intellectual philosophy, and sarcastic wit: others have a heart understanding of his weakness of will, or, it may be, they have, by reason of their greater sensi-

tiveness, a more perfect perception of what was perhaps a shrinking from the brutality of murder. Are Taine and other critics justified in their opinion that the Prince, because of the time in which he lived, did not hesitate, or rather was not influenced by any objection to staining his own hands with another's blood? The priests and scholars, in the darkest ages, were usually men of peace: and the one thing which gives peculiar distinction to Hamlet is his superior refinement in morals, and manners as well, to those about him; he despises the coarse revelry of the King; his own assumed coarseness of speech seems forced and unnatural, while to him we may well believe all murder appeared foul until his moral sense was corrupted by his becoming himself a murderer. One thing is certain, whatever may be the reason, all Shakespeare students in their unconsciously sympathetic attitude towards Hamlet, are actuated not simply by pity or admiration but rather by a fellow-feeling which of itself goes far to prove his sanity or their insanity.

Again, Hamlet's sanity finds strong proof in his failure to take his own life when so strongly tempted to do so. The world had become to him a stifling prison cell, or worse. No ray of light glimmered through the darkness of his distraction and uncertainty; the storm of passion raged fiercely in his soul; a way of escape from these present evils occurred to him, yet he stayed his hand, he took time to think of the hereafter; he remembered that the tenets of his religion included a belief in the sin and eternal danger of self-destruction. More than that, at this especial time, when all seemed to agree that he was presently to show in his interview with Ophelia a peculiarly "antic disposition," he was indulging his supreme love of contemplation; he was able to give his agony some vent in philosophic reasoning;

"Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune;
Or to take arms against a sea of troubles
And by opposing end them."

Would a maniac have acted thus? Would he not rather, having once thought of suicide as a relief from his troubles, become possessed of that idea to the exclusion of all others, and have put it into execution at the first favorable opportunity? To pass through this trying ordeal safely required a clear, strong intellect which would keep uppermost the influence of reason, conscience and duty. It was not insanity in Hamlet to think of suicide, it was nature. It was not insanity that forced upon his mind, so opportunely, the deterring influence of his religious scruples, but a clear, ever-present idea of his personal responsibility. It was not insanity that restrained his suicidal impulse by the thought of his father's unrevenged murder, but a firm, strong sense of what he believed to be his duty. The word duty is used here because it was probably in that sense the idea of revenge made its strongest appeal to Hamlet. His code of honor, whose unwritten law was an eye for an eye and a tooth for a tooth, doubtless held as sacred as the religion which was so little understood at that time, did not make simple revenge seem even ignoble, much less sinful.

A third proof of the perfectly normal condition of Hamlet's intellectual vision lies in his discriminating treatment of the people with whom he came in contact. His secret enmity to Claudius was very near to open warfare. Comprehending not only the King's baseness, but the keenness of his intellect as well, the prince at all times met Claudius as an adversary. He pointed every speech with a double meaning and in their various interviews maintained the coolness which a match of wits demands. Although he knew the King to be a dangerous enemy, he did not fear him nor did he exhibit the cunning of a maniac who would probably have sought to conceal his feelings towards one he hated until a fitting opportunity came for him to give them a sudden and violent revelation. Hamlet rather delighted in showing Claudius his hatred; he loved to make the "galled

jade wince," and while he hesitated to take the desired mode of vengeance, he was unsparing in the kind of warfare which came natural to him. The King himself speaks of Hamlet's transformation, but he was evidently chiefly anxious to discover the cause of his step-son's strange behavior; not only had his conscience made him a coward, but he could not close his eyes to his real danger from the Prince's manifestation of hatred and enmity; he did not believe Hamlet insane.

Before Hamlet saw the ghost he was cold and dignified, but respectful towards his mother. She had wounded him most deeply; her actions had destroyed his confidence in woman; yet she was his mother to whom he had given his heart's best affection; his reserve, his formality, his speeches to her when they are first brought together in the play, have not only an unspeakable pathos, but they are honest though refined^a manifestations of his displeasure. Even the shallow nature of the Queen comprehended this fact.

Later Hamlet probably brooded over his mother's possible guilt, or at least guilty knowledge in respect to the murder of his father; he sought to satisfy himself through the effect of the player-queen upon her; and, after this test, he was without doubt convinced of her innocence of this crime. In his awful interview with her, he seemed to wish first of all to arouse her to a sense of her degradation and to lead her to a repentant shame for her second marriage. What a vivid contrast he drew for her between her two husbands. He morbidly exaggerated her action into a worse sin than that of which she can justly be called guilty and exhibits therefor a terrible intensity of emotion; yet the intentional sternness, earnestness, and depth of feeling in his reproaches preclude the thought of either real or feigned insanity. In this connection, indeed, it savors of absurdity if not of irreverence to apply the term insane in either sense to him.

The sudden second appearance to him of the ghost may be looked upon as a delusion

—but why a delusion of insanity? Does it appear altogether improbable that such a mental picture should have naturally become a living impression upon the mind of a man whose imaginative, poetic temperament was laboring under the pressure of an excitement produced by thoughts of a wronged and murdered father? He was in the presence of one who had most shamefully insulted that father's memory; he had just received confirmation of his suspicions, or of the ghost's testimony, if the reader prefers, concerning the guilt of Claudius; he had but a moment before slain Polonius in mistake for the king, and had been thus foiled by his own hand of his revenge; still, his strong, intuitive instinct warned him that his indignation was in danger of expending itself in words only, when this "visitation" came to "whet" his "almost blunted purpose." For a moment his mother's surprise and consternation excited his pity and forced him to speak kindly to her. He tried to make her see the picture his mental eye gazed upon, but when she simply accused him of frenzy he restrained himself and soberly denied his madness, soberly entreated her to repent, and woos for leave to do her good.

The queen from the beginning of his trouble thought her son insane:—

"Conceit in weakest bodies strongest works."

It was natural for her to accept such an easy explanation of Hamlet's change from a gentle, loving, submissive youth to a gloomy misanthrope, whose satirical speeches, occasional unwonted excitement, and, finally, fierce reproaches, while they puzzled and alarmed her, in themselves had for her no adequate cause. It is worthy of emphatic notice that it is upon the feeblest characters in the play alone that a lasting impression of Hamlet's insanity is made.

The contempt he manifested for Polonius and the other courtiers, who have so easily transferred their affection and allegiance from the old and good king to the new and bad

one, would have been a most natural feeling in an honorable man at any period of the world's history, and indicated in him a soundness of moral as well as of mental insight.

Polonius rasped the prince's sensitive temperament, and aroused his special dislike both by acting as a spy upon him and by interfering between him and Ophelia. The irritating presence of the meddling, foolish old man, whose nature was in itself so antagonistic to his own, made Hamlet feel as if he must be on the defensive, and at the same time he yielded to the temptation to take an unfair advantage. He turned the battery of his wit upon the unfortunate, unsuspecting courtier who was further misled by the puzzling, yet pertinent speeches which even his dull wits comprehended were the result of madness with a method in it.

Rosencrantz and Guildenstern furnished food for Hamlet's newly acquired bitterness towards men, when he discovered they came under the guise of friendship to act as spies upon him, and thus serve as tools in the hands of Claudius. He protected himself with half-truths from them also and confused them with equivocal expressions.

His actions in regard to Ophelia, wherein he seems the maddest, are not wholly inexplicable on the ground of sanity. Two peculiar traits of his disposition, of which he elsewhere and everywhere gave proof, are brought out here perhaps more strongly than at any other time; that is, his generous overestimate of those he loved, and what, for want of a better name, may be called an alertness of the emotions. His love for Ophelia had not become a ruling passion, yet we may believe it was a sincere admiration which included perfect trust. He could not expect anything else from her than loving sympathy, if not a complete comprehension of his terrible trouble. This expectation was disappointed; he met, at first, repulsion of his honorable intentions, later, perplexity and pity only. Thus was his cup of bitterness filled to overflowing. Possibly it was in the

first shock of his disappointment that he rushed impulsively into Ophelia's presence, regardless of disarranged garments, and as she expressed it

"Falls to such perusal of my face
As he would draw it."

He seemed to desire to penetrate her inmost thought, to measure her heart and soul. Her frightened but otherwise irresponsive face did not arouse his compassion for her; his sigh "so piteous and profound" was for himself. This feeling, that she too had proved unworthy and faithless, rushed over him when he next encountered her, and he was goaded to a certain fierceness of temper and harshness of speech not altogether incompatible with the depth of his wound. He readily saw in her action, or attitude, a confirmation of his idea of the fickleness of woman which has followed his loss of faith in his mother. His strongly expressed contempt for love and marriage, as well as his accusations against himself, might have arisen partly from a sense of unfaithfulness in himself to love as an absorbing passion. But his speeches in this interview with Ophelia, strange as they appear, had too much pertinence, and exhibit too plainly their underlying meaning, to be called insane. His conduct at her grave is less easily accounted for. His already shaken nerves are naturally disturbed to the point of entire momentary loss of self-control by the news of her death brought to him so suddenly and under such strange circumstances. His imagination quickly pictured the dead girl in all her living loveliness and womanly sweetness, while his memory sped back to his harsh dealing with her and to the murder of her father, occurrences which he might naturally infer had much to do with her death. When his emotional nature thus instantly gained the ascendancy, remorse and despair demanded of him some outward expression; and while Laertes' passionate manifestation of grief irritated him, it furnished him an example; and in his fiercely

disputing with her brother the place of first or greatest mourner, might he not have been unconsciously influenced by an idea of atonement?

In Horatio, Hamlet found and immediately recognized a true friend; one who satisfied, as far as it was in the power of a single person to do so, his craving for intelligent sympathy. He acted freely with this friend alone, not only because he has with him the secret imparted by the ghost, but chiefly because he felt that Horatio understood his nature and appreciated the motives by which he was influenced. Horatio, at first, feared that the prince in his excitement at seeing the ghost would be led to the brink of madness or beyond. Later he exhibited no distrust of his friend's sanity, for he knew the apparent frenzy under which he labored had an adequate, explicable cause. To Horatio, Hamlet was sweet and noble, worthy of his admiration, love and devotion; not a lunatic who should be either feared and avoided, or carefully guarded.

Again the plans which were fully formed and skilfully carried out by Hamlet, were the result of intellect and thought, not of insane cunning; and the readiness with which he made use of circumstances shows a mind under complete control. This is specially the case in regard to the players, through whose presence he quickly found a means to prove to his own satisfaction the king's guilt. He embarked for England without protest, in charge of Rosencrantz and Guildenstern, but presently made good his escape by a pre-arranged plan which included the punishment of these false friends; he considered them despicable and treacherous, and the desire to bring retribution upon them and to foil the King's project against himself, explains his assumed willingness to take the journey, an attitude otherwise lending color to the theory of insanity.

The Prince's irresolution of itself, or by its nature offers a strong evidence of a mind capable of reason and intelligent thought.

The insane are vacillating, capricious and forgetful, but never can be strictly called irresolute. That state of mind implies thought upon a certain plan of action in connection with an ability, as well as a tendency to present deterrent reasons. The insane are never prevented from carrying out an idea of which they have become possessed, by any reasoning against it deduced entirely from their own minds. Fear may teach them caution and lead them to exhibit a pertinent cunning in what they do or attempt to do: but it is the unreasoning fear said to be shown by wild animals when first brought into the presence of a human being, a fear superinduced by a superiority instinctively recognized.

Hamlet did not fear to act; when he was finally convinced that it was his right and duty to avenge his father's death he hesitated because he shrank from murder, and also because he was doubtful of methods as well as of results. Moreover, he did not dwell simply upon one phase of his trouble; he made it the subject of serious contemplation and was thus constantly tempted to wander from the great point at issue; it was, in short, reflection that made him a waverer—

"The native hue of resolution

Was sicklied o'er with the pale cast of thought."

Again a certain deliberateness may be discovered in all the acts of a lunatic, even in those resulting from a sudden impulse. That is, their action is preceded by positive intention. Hamlet's deeds, on the other hand, may be called accidental. Through an accidental impulse he killed Polonius. Through accident he caused the death of Rosencrantz and Guildenstern. Finally, accident led him at last to deal the king a mortal blow. If Hamlet, subjected as he was to the influence of supernatural powers, and goaded to despair by a sense of his wrongs and sorrows, had become really insane no time would have been given him for irresolution, as his desire to murder the king would have been uncontrollable and the play as written impossible.

Perhaps the strongest proof of Hamlet's sanity lies in the fact that he manifested no actual impairment of the faculty of attention, a symptom which experts declare to be common to all forms of insanity. When first introduced in the play, the deepest melancholy overshadowed him, yet his pointed replies show a careful hearing of what had been said to him by Claudius and the Queen. He greeted Horatio rationally and though for a moment he was led to speak somewhat absently of his dead father, his attention was quickly recalled and he listened intently to the story of his father's ghost, and asked most pertinent questions in regard to the when, the where and the how; his reason then demanded the minutest details for its satisfaction. He was naturally much excited at the appearance of the ghost; he called it father and followed it as if impelled by an irresistible impulse, or power. He regarded it, however, not as if it was really his father speaking, but rather as a third person who had come to tell him of his father's fate. There is a strange and indescribable individuality in this supernatural being, a something distinct from, or beyond, its connection with the dead King which impresses the student in the way it may be considered to have impressed Hamlet. He listened to it attentively and was visibly affected far more by its words than by its presence; and, because he looked upon it chiefly as the bearer of a message from his father rather than as the spirit of his father, we are able to excuse in some degree the irreverent and seemingly unnatural ejaculations of the Prince after the ghost's repetition of the word "swear."

As has been said before, Hamlet in his conversation with Polonius uttered many strange things, yet there was evidently a purpose in his speeches and a peculiar pertinence as well, which the old courtier dimly felt. Hamlet greeted Rosencrantz and Guildenstern sensibly and with some degree of cordiality. He exchanged a few sportive words with them while he believed them to be true

friends and at the same time gave some vent to the melancholy by which he was so deeply oppressed. But his suspicions were soon aroused and he discovered by searching and persistent questioning that their friendship was not disinterested. He then sought to protect himself and to mislead these spies, also, by words, by a seeming frankness and a poetical description of his melancholy, and by a disquisition on man which, while it puzzled them, gave relief to his own heart, wounded again, disappointed in its hope for sympathy. There was still another and perhaps stronger cause for this same digressive speech; that is, Hamlet's tendency to poetize and philosophize, as others moralize, upon every possible provocation. But he readily recalled his thoughts, questioned interestedly, talked calmly and intelligently concerning the players. He gave the latter, when they presently arrived, a natural and characteristic welcome, greeting each with a jocose and relevant remark. Later he invited them to play, criticized certain faults in actors, and instructed them after the manner of a connoisseur in the details of their art; his reason must then have been as clear as his judgment was perfect.

When a little later he bewildered Rosencrantz and Guildenstern with his whimsical replies and declared his wits diseased he was, as it were, laughing in his sleeve at these sycophants whose intent to lead him to self-betrayal he so easily circumvented.

"Though you fret me you cannot play upon me."

This constant necessity under which Hamlet labored to protect himself from spies and to conceal his secret had a most irritating effect upon his naturally ingenuous disposition. Then the contempt which he felt for these weak, unprincipled men with whom he was surrounded, increased his newly aroused bitterness towards men, which, reacting upon himself, weakened his character. After the murder of Polonius he grew reckless yet his intellect kept on the alert; his former scarcely

disguised irony became contemptuous insolence in his treatment of the King. But whatever was the cause of his strange behavior in regard to the body of Polonius he evidently desired to yield no satisfaction to the King, and he framed his speech so as to defy as well as to insult Claudius. He knew full well what he was about.

Again when Hamlet met the forces of the Prince of Norway, his country's enemy, on Danish ground, he exhibited a natural curiosity and interest in their movements, and his queries were not only intelligent but framed specifically to meet important points. The spirit shown by Fortinbras, and his proposed struggle, based on a question of honor simply, touched Hamlet on a very tender spot and led him inevitably to self-reproach.

In the first part of the graveyard scene his strange philosophisings were not unnatural to him, though at that time biased by his morbid condition of mind: and even then he carried his fantastic speculations to some end, thus showing a conscious purpose, a reasoning power. In his uncontrollable excitement at Ophelia's grave he seemed to talk irrelevantly, yet as it has been suggested elsewhere there was no real irrelevance in his wild speeches. Soon afterwards he spoke calmly and reasonably while he narrated to Horatio the story of his adventures. And in his replies to Osric he imitated and ex-

celled the latter in his euphuistic speech. His apology to Laertes was a little strange, yet in his cooler moments he might easily have recognized the apparent madness of the passion which possessed him at Ophelia's grave. Finally, when a word or two spoken by the dying Laertes revealed the King's treachery, he realized in a moment that the time for reflection and hesitation had passed, and that he must do his appointed work and satisfy the claims of vengeance quickly, or not at all. The hour had come and he was ready for it. With a stern solemnity he compassed the death of Claudius, then turned to Horatio, and, with his fast ebbing breath, bade his friend live to clear his name from infamy.

Thus throughout all of these scenes where his nerves were strained to their utmost tension, where he was suffering constantly from suppressed excitement, he nowhere forgot himself entirely, nowhere manifested any real impairment of attention, except in the single instance of the scene at Ophelia's grave, when for once the flood-gates of passionate emotion and excitement were burst through and free rein given to his torrent of varied and inexplicable feelings. If he was insane, then (the theory of feigned insanity at that time would be untenable and revolting) how many times must the uncontrolled passions of men whom we meet daily, prove them to be insane.



THE SUPREME COURT OF WEST VIRGINIA.

II.

BY J. W. VANDERVORT OF THE WEST VIRGINIA BAR.

HON. James Paull, Associate Judge of the Supreme Court of Appeals of West Virginia, an eminent member of the Ohio County bar, and a highly esteemed citizen of Wheeling, was born near St. Clairsville, Belmont County, Ohio, on the 6th day of July, 1818, and died at his residence in Wellsburg, May 11, 1875, at the age of fifty-seven years. He was the son of George and Elizabeth Paull, whose ancestors were among the early settlers of Western Pennsylvania. James Paull was thoroughly educated in boyhood, and after completing preparatory studies at Cross Creek, Pennsylvania, he entered Washington College, and graduated from that institution in June, 1835. He came to Wheeling, and choosing the law

as his profession, he learned the routine of practice with Zachariah Jacob, Esq., an able lawyer, and finished his studies in the law department of the University of Virginia. Mr. Paull continued his residence in Wheeling, where he lived up to within eighteen months of his death, during which time he resided at Wellsburg. For a short time after graduation he was engaged in teaching

the higher branches in the Linsley Institute. In the years 1855 and 1856 he represented Ohio County in the Legislature of Virginia at Richmond, as a member of the Whig party. In 1872 he was nominated by the Democratic party and elected judge of the

Supreme Court of Appeals. He was the only resident lawyer of Ohio County ever elected to that position. Mr. Paull devoted himself wholly to the law, in which he became eminent even before he reached the zenith of manhood. Never robust, but always industrious, the labors of the Supreme Court judgeship proved injurious to his health. His associates on the bench begged him not to overtax his strength, but he could not obtain his own consent to fall short of his full share



JAMES PAULL.

of duty, and therefore kept on at hard work until his health gave way, and he fell just after his sun had reached its noon. His decisions were clear, able, exhaustive, honest. He left a high record as a judge, and as a citizen all who knew him esteemed him as an honest man. His decisions in the West Virginia reports are among the most valuable contributions to the law of the State. The

following admirable tribute to Judge Paull is from a biographical sketch of him by Honorable George W. Atkinson in "Prominent Men of West Virginia." The stamp of sincerity and eloquence is in every line:

"A truly good man's character rests on a granite basis, which sustains the structure of public virtue and private integrity, while an inflexible personal independence keeps guard over the intellect and conscience, and challenges the advance alike of friend and foe to this seat of power and secret of success. The subject of this sketch had no other aim in life than to be right and do right. He did not defer to the decision of the popular judgment as the sum of political wisdom and the inevitable law of duty. His own and not the public sense was his rule of action as citizen, attorney and judge. He paid little court to the people, and practised no artifices and employed no gratitudes to enlist them in his interests or purposes. He influenced men not so much by the sublimity of his sentiments as he inspired confidence and admiration by the dignity of his manners, the clearness of his understanding, and the purity of his life. Skepticism of all kinds was foreign to his mental constitution. Thoughtful and sincere, with characteristic independence of creeds and traditions, his was a nature to feel the religious sentiment strongest as it dwells apart in the silence of the soul. Profoundly spiritual both by nature and education, his life was an exemplification of faith in God and a Christian's hope of endless and more exalted life. Judge Paull was a man of fine natural powers of mind. These had been developed by the advantages of a liberal education in early years and by much cultivation in later life. In point of taste, culture, information, sound judgment, and the like, he occupied a very high place among men. In his tastes he was simple, but highly refined. Anything that savored of ostentation was extremely offensive to him. Equally repulsive was anything that was in the slightest degree akin to vulgarity. He was a man of

remarkable purity of character. He was always distinguished by the most unswerving integrity. Those who knew him best say that his life was as nearly blameless as it is possible for humanity to be. He was just, upright, Godfearing, and he loved his fellow-men. He was possessed of all the attributes that go to make up the full, noble character of the Christian gentleman, the highest type of manhood on earth. There are two relations in the life of this distinguished lawyer and jurist in which his character shone out with the greatest beauty. One of these is that of the family — homelife. His home was the abode of the most delightful peace and love. As a husband and father, it is but truth to say, he was a model. His memory therefore in that circle must ever be cherished with a fondness that is not often equaled. The other of these relations was that of the church. While yet a young man he united with the First Presbyterian Church, Wheeling, and at the end of more than a quarter of a century of religious living, no man could truthfully say that he ever brought reproach upon the cause he sought to uphold and defend. He was not a negative Christian. On the contrary, he was an earnest worker. For eighteen years he was a ruling elder; he was at the same time a constant attendant upon the sessions of the Sabbath School and week-night prayer services, always taking an active part. It can be said of him, as of but few public men, he was constantly foremost in every proper place in laboring for the good of his fellow-men."

Judge Paull was twice married. His first wife was Miss Jane A., daughter of the late Judge Joseph L. Fry, a lawyer of profound attainments, who for many years resided at Wheeling. They had issue three sons, Archibald W., Joseph F., and Alfred, all prominent and enterprising citizens of Wheeling. Judge Paull's first wife died March 9, 1860. He married Miss Eliza J., daughter of Samuel and Sydney (Heiskell) Ott, on March 19, 1861, who became his second

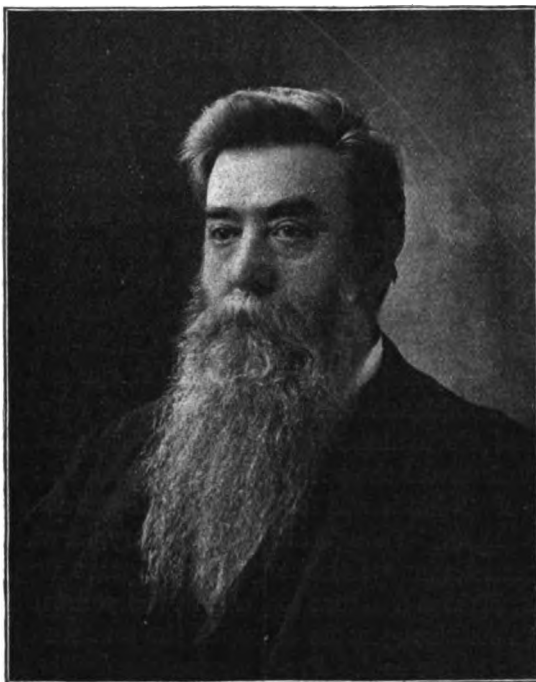
wife and the mother of five children, all living at the time of his death and now surviving. They are, first, James, who married Marianna, daughter of J. G. Jacob, of Wellsburg, West Virginia; Harry W., manager of the Eagle Glass Works of Lazearville, a branch of the Nail City Stamping Company of Wheeling, and a bright and promising business man; Samuel O., connected with the Nail City Stamping Company; and two daughters, Elizabeth B., wife of W. C. Jacob, and Margaret S., who with their mother reside at Wellsburg. Mrs. Paull and her family are active members of the First Presbyterian Church of Wellsburg, of which her eldest son, James, has been elder for several years. Mrs. Paull's parents were native Virginians, the father of Winchester, and the mother of Woodstock. Her father died in August, 1868, aged sixty-nine, her mother on August 5, 1882, aged seventy-seven. Both were devout Christians

and earnest workers in the cause of religion, and their memory is an inspiration to good and useful living. Mrs. Paull resides in the commodious brick mansion which Judge Paull made his home, on a beautiful elevation in Wellsburg. In the "History of the Presbytery of Washington," p. 237, this reference is made to the deceased jurist.

"In a sermon preached by Dr. Fisher in memory of Judge Paull, he thus speaks of several of these brethern: 'I remember him (Judge Paull) as the sixth of the ruling elders

who have actively served this church during my pastorate and who have now gone to join the General Assembly and Church of the first-born. The first was John Robertson, who went to heaven soon after I came to this city. He was a good man. The next was that sweet-spirited, upright man, Jacob Seneney. The next was Zachariah Jacob, a man of sterner mould, but one who lived and labored for Christ and who died in the faith.

The fourth was J. Gamble Baker; he too was a man of God. In the other world he has a higher place. This world was not worthy of him. The fifth was Joseph A. Medcalf. The term of his official service was not long, but it was sufficient greatly to endear him to many for his kindness and peaceable disposition. And now James Paull is with these brethern, and Dr. Weed, and Mr. Wylie, and that godly company who from this church have ascended to glory. All who read



OKEY JOHNSON.

of the noble career and untimely death of Judge Paull cannot fail to be impressed with the sense of loss and sorrow borne by his wife and children and shared by the community in which he lived. It is inexplicable to human understanding why men so gifted, so wise, and so good as he was are not always endowed with physical powers equal to their labors and responsibilities, and sustained to old age in the fullness of a glorious life. Their example, however, is imperishable, and Judge James Paull is a name that shall adorn

the historic page of both State and Church among those "good and faithful servants" whose talents were used for their fellow-men and for the Lord to the gain of an hundred-fold."

Judge Johnson was born in Tyler County, Virginia, March 24, 1834, one of a family of fifteen children who grew to manhood and womanhood. He worked on a farm in summer and attended school in winter. In 1856 he graduated at Marietta High School. He studied law at Harvard University where he received the degree of LL. B., in 1858. In July of that year he was after a rigid examination by Judges G. D. Camden, David McComas and Geo. W. Thompson, eminent judges of that day, admitted to the Virginia bar. Shortly after his admission he removed to Parkersburg where he actively practised until 1877; as was the custom he attended the courts in adjoining counties.

He received in 1874 the degree of A. M. from Marietta College, Ohio. He was presidential elector in 1864 on the McClellan ticket, and on the Greely ticket in 1872. In 1870 he was elected a member of the State Senate over a majority of 650 at the previous election and was elected by a majority of 700, and carried every county in the district.

He was elected to the Constitutional Convention, by 2,000 majority, of 1872 in which he took a very prominent part, and was chairman of the committee on the executive department.

In 1876 he was elected on the Democratic ticket a member of the Supreme Court of Appeals of West Virginia by over 17,000 majority and served in this position for twelve years. For seven and one half years of this period he was president of the court. He wrote over 300 opinions which are found in volumes 10 to 31 inclusive. In January, 1889, he resumed the practice of law in Charleston, the State capitol; he has since that time had many cases in this court and has for the most part been successful.

In June, 1895, the position of dean of the

law college of the West Virginia University was created, and he was elected to fill it. He is professor of constitutional, international and corporation law, and has largely aided in bringing this law school to a high standard of proficiency. Many of his judicial decisions have of necessity been on most important questions and involved large amounts, but he handled them with the acumen and skill that his literary training and long study and practice at the bar fully prepared him.

In the case of the Chesapeake & Ohio Railway Company *v.* The State Auditor, this company was obliged to pay to the State taxes amounting to a large sum. A State statute which exempted this company from the payment of State taxes was declared unconstitutional. This cause is reported in 19 West Virginia reports and the principles there decided are approved by the Supreme Court of the United States in *Freeland v. Williams*, 130 United States reports.

His opinions took the widest range and are marked by profound learning, and it was during the period that he was judge that the opinions of this court were brought into prominence in other States and by the law textbooks of the United States.

Judge Johnson is a very large man, over six feet tall, wears long whiskers, has a swing in his walk; when arguing a cause and in the excitement of his theme his voice is loud and sonorous, and so vehement is he that a stranger might assume he was very angry. It is said that one summer day at Charlestown and while he was in consultation with Judge Green in a room at the Carter House, the proprietor of the hotel, who was not kindly disposed to Judge Green, heard Judge Johnson pressing his view of the cause so vigorously that he immediately came down into the hotel office and told the crowd gathered there, "Well, that is the best thing I ever heard—I never heard any man give another such a tongue lashing as Judge Johnson gave old Green, and he well deserved it."

Another incident in the life of Judge John-

son has come to my notice worth relating. In the early years of his practice it is said he prosecuted in Roane County a slander cause. B. was accused by V. with having stolen his sheep and at all times and places in season and out of season V. would *bah!* like a sheep at B. B. finally could stand this treatment no longer and naturally consulted Mr. Johnson by whom it is supposed he was told that he had a good cause and so confident was he that he would prosecute the cause for half the recovery. The case was fought pro and con with great vim and was argued at great length.

Finally the verdict was handed in "one cent damages." Thereupon in the hush incident to the interest of the cause among the people in the crowded court room, V. in his homespun clothes arose and walked over to Mr. Johnson and handed him one cent, remarking in his drawling homespun style, "Here Mr. Johnson is your money — I don't want an execution — I understand you are to get half."

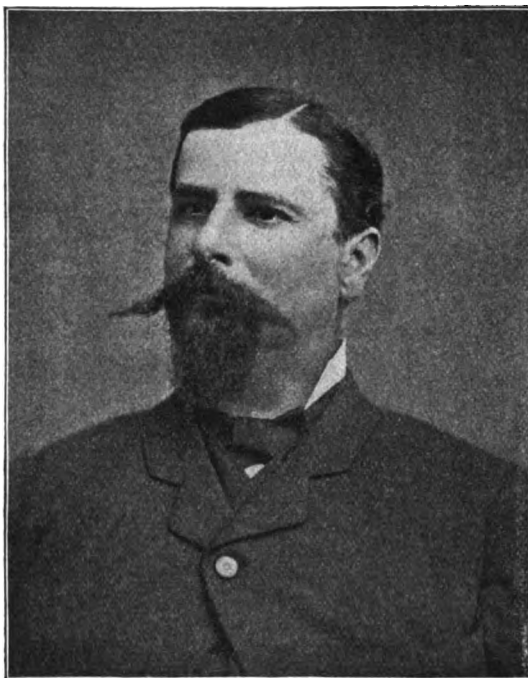
Judge Johnson has been for forty years a prominent member of the Baptist Church and has frequently presided at the associations of this church. While now sixty-five years old, he is in his prime and bids fair to give to the State many years more of usefulness.

Among those who in their young manhood took a distinguished place in the affairs of State is the subject of this sketch.

Judge Patton was the youngest man who

ever sat upon the Supreme Court of our State and one of the youngest on the Supreme Bench of any State.

He was of distinguished ancestry and showed in his ability and success in life the stock from which he came. He was born September 19, 1843, in Richmond, Virginia. He was the son of the Honorable John M. Patton, who was for many years one of the acknowledged leaders of the Virginia bar.



JAMES F. PATTON.

His mother was Peggy French Williams, a woman of rare beauty, gentle disposition, and of superior culture and accomplishments. On his father's side he was a great grandson of General Hugh Mercer, the hero of Princeton in the American Revolution of 1776, and on the mother's side of Major John Williams and Captain Philip Slaughter, officers of that war, who fought at Brandywine and Germantown. He was also descended from Pierre Williams, sergeant at law of Lon-

don, England.

Judge Patton's school life was spent in and about Richmond. He was a student of Hanover Academy, presided over by Colonel Lewis Coleman an accomplished scholar. While here, his father's death in 1858, left him with the gravity of life's problems confronting him at an early age. He retired with his mother and her family to their country seat in Culpepper County, Virginia. Soon the Civil War came and at its outset, although only eighteen years of age, he cast

his fortunes with the south and became lieutenant and then major in the 22d Virginia regiment, commanded by his brother, Colonel Geo. S. Patton.

It is said of him that in battle he was always at the front shrinking from no danger but braving every peril.

At the close of the war he began the study of law under his brother-in-law John Gilmer, Esq., of Pittsylvania, Virginia. On his admission to the bar, he began active practice and soon took front rank in the profession.

In April, 1869, he was married to Melinda Caperton, a daughter of Senator Allen T. Caperton of West Virginia. Shortly after commencing his professional career he formed a partnership with his father-in-law, Senator Caperton, at Union, Monroe County, West Virginia. This was his home until his death.

On the resignation of Judge Moore from the Supreme bench, Governor J. B. Jackson appointed June 1, 1881, James French Patton, Esq., then in his 38th year, to fill the place. He occupied this position until his death, March 30, 1882. Stricken by death in his young manhood ended a career full of promise; he left a widow and two children. His son A. G. Patton, Esq., is a promising young lawyer, now practising law in Parkersburg, West Virginia.

Another referring to Judge Patton uses this language: "In personal attraction he had few superiors. Of commanding presence, graceful action, pleasant voice and magnetic smile which revealed the wealth of his warm heart, he attracted the confidence and esteem of all who made his acquaintance. All who came within the circle of his personal influence, were thenceforth his devoted friends. He was admired for his intellectual talents and beloved for the excellent qualities of his manly heart.

He possessed in an eminent degree that power of analysis, that quickness of perception, that equipoise of judgment and that knowledge of the law, which most befitted the character of a judge of a court of last resort."

Judge Snyder was born in Highland County (then Pendleton), Virginia, March 26, 1834. After attending the local schools of the neighborhood, he attended Mossy Creek Academy, Augusta County, Virginia, in 1852-1853; Tuscarora Academy in Mifflin County, Pennsylvania, in 1854-1855; Dickinson College, Pennsylvania, in 1856; and Washington College (now Washington and Lee University) Lexington, Virginia, in 1857-1858. Here he completed his studies and it was here he entered the law school of Judge John W. Brockenbrough one of the Judges of the United States District Court. Judge Brockenbrough was a scholar of profound attainments and a lawyer and judge eminent in the profession. The greatest feeling of friendship and even comradeship existed between him and his students. That he was a teacher capable of inspiring his students with love of learning and high ambitions is readily seen in the success of many lawyers of Virginia and other States even yet in active practice. It was the custom of Judge Brockenbrough to have many of his students appointed on the petit juries of his court; they attended many sessions of the court at different places and had the advantage of his oversight, instruction and tuition, thus obtaining an insight into actual practice so difficult for the ordinary student to obtain. By this means they lived with their preceptor day by day and no one profited more by this training than did young Snyder. And the kindly relations thus strengthened between students and teacher, and in after years it was the pride of these students to speak in deepest veneration of their preceptor.

Judge Snyder was an apt student; he had a strong and vigorous mind and possessed a good physique. What he learned was not by memory or rote; his ideas became a part of his life, like the sap of the tree, enlarging and strengthening him year by year by real growth and vitalizing force — no thought of his was obscure, it was clear cut, exact and well understood. His opinions on the bench

resemble somewhat the production of an eminent sculptor — every feature clear and well defined. The lights and shadows of his mind so encompassed them that they stand forth on the printed page to be seen and understood of all men.

He was possessed of so fine a grade of what is called "common sense" that it became uncommon and often was with him in the rescue of obscure and yet material facts, the turning points in a cause.

In 1859 he received his license and began the practice of the law at Lewisburg, Virginia, now West Virginia. Here he lived the greater part of his life until July 24, 1896, the date of his death.

In 1861 he volunteered in the Confederate army and was adjutant of the 27th West Virginia regiment of the famous "Stonewall Brigade" until 1863, when he was captured and held prisoner in the old Athenaeum at Wheeling until 1864. At the first and second battles of Bull Run, Harriestown, Winchester, Cross Keys, Port Republic, the Seven Days' Battles around Richmond, Fredericksburg, Chancellorsville and Gettysburg, he was in the thickest of the fight. He was wounded and was unable to again join his army.

In 1869 he married Miss Henrietta H. Corey of Lewisburg. Five children resulted from this marriage.

After the war he resumed the practice of the law.

In 1865 he was elected Prosecuting Attorney of Highland County, Virginia. He continued his practice until 1882 when he was appointed by Governor J. B. Jackson to fill the unexpired term of Judge James F. Patton, deceased, on the bench of the Supreme Court of Appeals of West Virginia. To the same position he was elected in 1882 to fill this unexpired term, and again in 1884 for a full term of twelve years. Here he

remained until in 1890 he resigned. He had acquired a competence from his practice and from profitable investments, and after his retirement from the bench he only accepted a few cases in the highest courts. As is said of him by Judge Okey Johnson, "His opinions are models. They come fully up to the proper standard of judicial opinions, nothing repeated, nothing omitted, long enough to make everything clear, not too short so there might be a feeling of disappointment



A. C. SNYDER.

that the reasoning was incomplete. They generally give but one reason for the point decided and that the best one, and each point sustained by only the most pertinent authority. He wrote many opinions which will be found in seventeen volumes of our Supreme Court Reports, from the twentieth to the thirty-sixth inclusive. They are all there, clear and convincing.

"He was a most conscientious judge. His whole aim was to decide the case according to law, without regard to consequences.

Nothing but strong reason and authority, having the force of *stare decisis*, could drive him from a position taken after due consideration.

"In the consultation room he was extremely tenacious of his opinions, and would only yield to reason, or binding authority. I have seen him carry his points many times in consultation, by the force of his reasoning. But he would yield quickly and gracefully if convinced he was wrong.

"As long as jurisprudence shall command the admiration of the lawyer, judge and statesman, and have the respect of the people, the value of Judge Snyder's strong and convincing opinions will increase, and their luster will never fade."

No higher encomium could be tendered by one man to a fellow laborer than the above, nor one that more fully receives the stamp of approval that our people have awarded to Judge Snyder.

It is needless to say more of the abil-

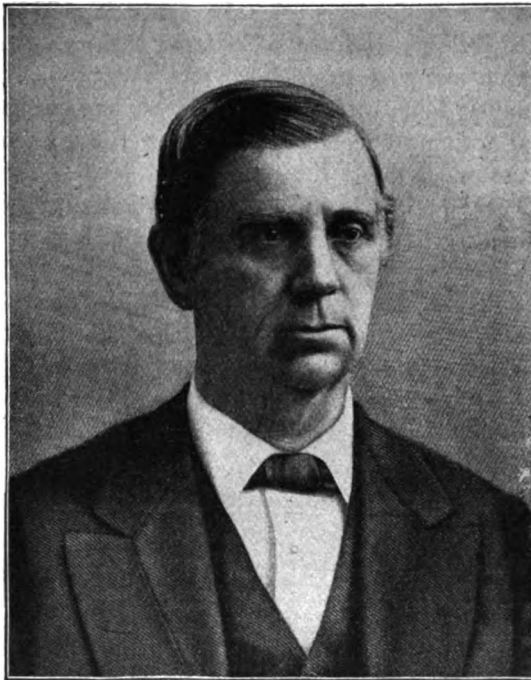
ity of this man or to even quote from special opinions to prove the estimate which has been placed upon him. The careful student and lawyer can readily follow the opinions themselves with profit. "By their fruits ye shall know them."

Judge Snyder was tall, rawboned with clear cut features, wore whiskers short and well trimmed, was round shouldered, even stooped as if the weight of years or wisdom might have taxed his frame. He died in the prime of life, loved and admired by all.

Men are fashioned in different molds and their physical and mental development in early years leaves a marked effect on their latter life and on the lives of others.

Judge Woods was a man well developed mentally, morally and physically. He was large and handsome, over six feet tall, weighed over two hundred pounds, had a pleasing and gracious manner, and his life has been an inspiration to many a young man who had the pleasure of his acquaintance. The writer from early manhood knew him well until the time of his death.

He was a man of strong religious convictions and of pure Christian character, what he believed and professed he lived not proudly, but meekly, not apologizing for his faith, but showing his faith by his works. He was fond of his children and affectionate, and as tender as a woman. I was at one time in court soon after coming to the bar, when he was in the midst of the trial



SAMUEL WOODS.

of an important cause. His son, a young man who was a classmate of my own, happened in the same town just from his own and his father's home. The judge excused himself, reached over the railing and greeted his son with a kiss — such a man I could not but think was a good man.

Judge Woods was of Irish ancestry, was borne in Beauce County, Canada, East, September 19, 1822. His parents were poor and in his early boyhood he removed with them to Meadville, Pennsylvania, where Al-

legheny College is located, and while there he worked at the trade of plasterer with his father. He entered this college where he graduated in 1842.

He studied law with Fox Alden a noted lawyer of Pittsburg. He taught some years and was one of the teachers in the old academy at Morgantown, Virginia.

In 1844, he married at Meadville, Pennsylvania, Miss Isabella Neeson, a sister of James Neeson a prominent lawyer of Richmond, Virginia.

In 1849, he moved to Philippi, Barbour County, Virginia, and began the practice of law. He soon by his ability, fidelity to his clients, by his fine mental training and honorable life achieved success and became the leading lawyer in his vicinity and one of the best in that part of Virginia. He made the most careful preparation of his cases; he was vigilant, prepared at every point, and in an emergency he was so well grounded in the law and so eloquent and convincing a speaker that he seldom lost a deserving cause.

He was free from the habits that, in many cases, dwarf the body, deaden the soul, and weaken the intellect. He never used tobacco or spirituous liquors.

It is said that on the walls of his office he placed the mortar board and trowel, the tools of his early trade, a continual reminder, I have no doubt, of his early hardships and the dignity of honest labor, and an incentive to the great success he achieved in his chosen profession.

He was a man of fine literary taste, a lover of poetry, an adept in mathematics, a linguist of no mean pretensions, and so while the labors of the day in his profession were closed, he entered at home into sweet communion with his family and by his general reading broadened and strengthened his mind.

When the war came he was in doubt which pathway to take, *that* in the direction of the union or the *other*, with his State and toward the sunny south — the latter he chose, honestly, I have no doubt, and faithful to the

cause he espoused he became attached to Stonewall Jackson's command and remained in the south until the Civil War ended. When he returned to his former home he resumed the practice of his profession and thereafter achieved even greater success than before.

In 1871, he became a member of the Constitutional Convention and was chairman of the committee on bill of rights and elections and did much toward securing the adoption of the new constitution of West Virginia.

In January, 1883, he was appointed by Governor J. B. Jackson on the Supreme bench of West Virginia in the place of Judge Haymond who had resigned. At the general election in 1884, he was elected to fill this unexpired term. He was an able and conscientious judge and his long practice at the bar well fitted him for the position. In 1888, on the expiration of his term of office, he retired from his profession to manage his private business. In that year his *alma mater* conferred upon him the degree of LL.D., an honor well deserved. He was a prominent member of the Masonic fraternity. An incident is said to have occurred while he was a member of the Supreme Court, perhaps without parallel. He and Judge Johnson while holding court in Wheeling attended one of the meetings of Miss Jennie Smith, the revivalist. While there a man was in deep mental distress at the anxious seat; both the judges were called upon to pray for the poor penitent, both responded and as is said half the Supreme Court of West Virginia were there on their knees wrestling with God for mercy for that poor distressed soul. Each by this act felt he had done his duty and neither was ever afterward ashamed of this humble part he had taken in behalf of the penitent.

For many years Judge Woods was a faithful and prominent member of the Methodist Episcopal Church.

Judge Woods died suddenly on February 17, 1897; he left three daughters and three sons, the latter are all lawyers, worthy sons of a worthy sire.

And as his bark put out to the sea of Eternity, I feel sure he could say in the words of Tennyson, — "For though from out our bourne of time and place, the flood may bear me far, I hope to see my Pilot face to face when I have crossed the bar."

One of the most distinguished men in West Virginia and one known favorably in the realm of letters, is Daniel B. Lucas, "The poet of the Shenandoah Valley." He was born in Charlestown, Virginia, March 16, 1836. He came of distinguished ancestry, who for generations have been prominent in the wars and affairs of Virginia, even prior to the Revolution.

After attending private schools he entered the University of Virginia with the session of 1851-1852, where he continued for four years, when he was graduated.

He has a poetic temperament and early showed a fondness for the Muse, and while at the University exhibited oratorical powers and was chosen the valedictorian of his class.

He, on graduation, entered the law school of Judge John W. Brockenbrough of Lexington, where he was graduated in law in 1858. He was admitted to the bar and commenced practice in Charlestown, his home, in the spring of 1859.

Early in 1860 he removed to Richmond and at the opening of the war in 1861, he cast his fortunes with the south and joined the staff of ex-Governor and General Henry A. Wise.

The tragic scenes of conflict, the blood and carnage in the field and incidents and comradeship of the camp with the deep issues involved in the final outcome of the war left a deep impression on his sensitive and poetic nature, and it was during these times and scenes and those immediately following that his best compositions were written. In 1865 he ran the blockade to Canada to assist in the defense of Captain John Yates Beall, a college friend

who was tried as a spy and guerrilla at Governor's Island, New York, by a court martial, and although he was obliged to cut through the ice in a small boat and cross the Potomac from Richmond where it was nine miles wide, he, however, was not permitted by Governor Dix to take part in the defense of his friend, who was ably defended by James T. Brady of New York. He continued for some time in Canada where he wrote his beautiful poem,

"The land where

we were dreaming." This poem was first published in Canada and was copied in many papers in this country and in England.

Having returned to his home, in 1870, he resumed the practice of law in partnership with Judge Thomas C. Green, and by his ability, training and skill soon took front rank in the profession. He had a large practice in the Supreme Court of this State, many of his cases were of great importance and were managed by him with signal success.

While devoting himself so assiduously and



DANIEL B. LUCAS.

successfully to his profession and many spare hours to poetry and other compositions, he yet found time to now and then on the lecture platform deliver some admirable lectures. Among them his lectures on Daniel O'Connell, John Brown, John Randolph and Henry Clay are the most notable.

He has always taken a very decided position and has always maintained a rigid adherence to the democracy of the early fathers of the republic, and has raised his voice against the departure from the faith and doctrines of Jefferson, Madison and Monroe. In 1872 and 1886 he was presidential elector on the Cleveland ticket.

Mr. Lucas was a regent of the State University for eight years and in July, 1876, was unanimously elected professor of law in that institution, which he declined, and in the same year he declined the appointment of judge of the Circuit Court as his practice would not warrant his acceptance of these positions.

In 1884 the State University honored him with the degree of LL. D., worthily accepted and bestowed. In 1884 he was a member of the State legislature and while there he became the worthy champion of the common people and advocated greater equality of taxation on all classes of property, and was particularly bitter against what he claimed were the unjust privileges possessed by the railroad companies in this State.

He was instrumental in the defeat of Johnson N. Camden for the United States senate and he gathered around him in this political fight a small coterie of his own party inspired and held together by the vigor, defiance and ability of their leader. At this session in the early part of 1887, no senator was elected and on its adjournment Governor Wilson appointed Mr. Lucas United States senator, but at a special session held in April, Charles James Faulkner was elected senator.

On the death of Judge Green his former partner, Mr. Lucas was appointed to the Supreme Court of Appeals in December, 1889.

In 1890 he was elected to fill this unexpired term and served until January, 1893. His opinions are marked by careful thought and a full knowledge of the law, and are expressed in language correct and with a grace that bears the touch and taste of the scholar.

Mr. Lucas has read original poems on special occasions that have brought him into significant and marked attention by the public and men of letters, at the semi-centennial of the University of Virginia, 1879, at the Delta Kappa Epsilon Literary Society for the northwest at Chicago, October 19, 1887, at the annual banquet of the New York Southern Society held in that city February 22, 1888, and at other places.

Among the literary productions of Judge Lucas may be mentioned "The Wreath of Eglantine," "The Maid of Northumberland," "A volume of Poems," "Ballads and Madrigals," 1884.

Judge Lucas is most happy in his after-dinner speeches; they sparkle with wit and in them are often found gems of literary beauty. He is not a robust man and yet has been capable of great labor and usefulness and is an honor to the two Virginias. His varied experience in so many lines of labor have tended to strengthen rather than weaken his effectiveness and success in the law, his chosen profession.

He was married in 1869 to Miss Lena Brooke of Richmond, Virginia; they have one daughter, an only child.

Mr. Lucas still continues his practice with success, his eye has not dimmed, nor his voice weakened, nor has his strength abated, but he still meets on common ground each and every foe that cares to try the keenness of his blade.

LEAVES FROM AN ENGLISH SOLICITOR'S NOTE BOOK.

VI.

A SUNDAY AFTERNOON NAP AND ITS CONSEQUENCES.

BY BAXTER BORRET.

WHEN I was in practice in Georgetown, in one of the midland counties of England, a near neighbor and intimate friend of mine was Ralph Jackson, a doctor who hailed from Lancashire. He was a very good fellow, skillful in his profession, and hardworking, with a large practice amongst the poor of the town; but excessive competition, bad debts, and ill luck generally combined to make him at the end of ten years, lose heart, and he came to me, one evening, with a long and sad story of his troubles, and announced to me his intention of throwing up his practice and going to try for better luck in Adelaide.

"You will never surely take your delicate wife and your little girl out with you to face the trials of colonial life, Jackson," said I.

"No, Borret, that is the hardest wrench of all. I must leave them behind me."

"Well, old fellow, all that my wife and I can do for them in your absence shall be done, I need not say; but is there no relative of your own, or of your wife who will take them in for a year or two?"

"No, my wife has not a single relative in the world, nor have I; I was an only child, and so was my father — no, there I am wrong. My father had a sister, who made an unfortunate marriage and died soon after."

He told me the story more fully as we sat smoking in my study. Within a month of this conversation Jackson left Georgetown for Adelaide, a lonely exile to an unknown land. At first letters came regularly by each mail, then they grew less frequent, and became more and more despondent. At the end of the second year his wife fell ill, and to add to her troubles little Margaret, her daughter,

caught scarlet fever, and had a bad time of it; then the mother caught the same illness, and had not the strength to battle with it. In a few days little Margaret was left a motherless little pet of only seven years old. My wife had helped to nurse mother and child in their illness and now took the little one to her heart; we had no children of our own; we had loved one little one and lost her; and so Margaret came as a bright sunbeam into our house. On me fell the sad task of writing to tell Jackson that he was a widower, but I could at least comfort him by telling him that his little girl had a home with us.

Five more years passed, with letters now and then from Jackson telling me of his struggles against poverty and starvation.

Early in 1878, business took me to Lancashire, and I stayed with a friend, a brother lawyer in Manchester. One evening after dinner our conversation turned on the subject of the Duchy of Lancaster, and of the right of the Queen to windfalls in the shape of escheats; that is, whenever any one dies within the limits of the Duchy, without a will, and without relatives, the Queen in right of the Duchy claims all the property. My host told me that a very substantial property had recently escheated to the Duchy on the death of a man named Ainsworth, who had in his earlier years married a young lady; that she had died a few years after the marriage, and that after her death Ainsworth had led the life of a miser, making money-getting the sole object of his life; that he had hired a housekeeper to look after his comfort, and she had inveigled him into marrying her, and into making a will in her favor, but she had died a few days before Ainsworth, and there

being no will capable of taking effect, and no known relations, the Duchy had claimed all the property as an escheat, and that between £15,000 and £20,000 was then in the hands of the Duchy waiting for claimants; that it was known that Ainsworth himself had no legal next of kin, having been of illegitimate birth, and that his last wife was also an illegitimate child reared in the work-house, but that there was an impression that there were relatives of the first wife, who would be entitled to claim as next of kin if they could be found.

When I went to bed I was too restless to sleep, and my thoughts suddenly took definite shape. Ainsworth — Manchester — what had I once heard to connect the place with the name? And then (by one of those extraordinary freaks of memory which now and then occur to every one, I fancy) I remembered word for word part of my conversation with Ralph Jackson on the night when he told me of his determination to go abroad. I remembered his words distinctly, "My father had an elder sister named Mary who married a man of low birth living in Manchester named Ainsworth; my aunt died a few years after her marriage, and many years after her death Ainsworth married some low woman, and my father never held any communication with him after his second marriage." I felt so strangely moved by this sudden flash of memory that I got up at once, lit my candle, and wrote down the words exactly as I remembered them.

I wrote out to Jackson by the next mail, telling him what had been told to me in Manchester, and urging him to return to England and claim the money, if he felt reasonably certain that the dead man Ainsworth was the first husband of his Aunt Mary. In those days communication with Adelaide was slow and I could not rely on receiving any reply for six months.

On Saturday the 21st of September, I received a letter from Jackson, saying that he felt certain that Ainsworth was the man who

had married his aunt; that he had some years previously had to prove his pedigree strictly in relation to some property which had been in the family for two generations, but at the moment of writing, he could not quite remember all the details, or where the proof of the pedigree could be found; that he was leaving Adelaide at the end of July by the clipper ship "Crest of the Wave," and would be in Liverpool before the end of October; and that he hoped during the voyage home his memory, which had become impaired through illness, would revive.

And now comes the strange part of my story, which I can only record faithfully just as it all happened.

On the afternoon of the next day, Sunday the 22d of September, being myself out of health, overworked, and longing for a change of air and scene, I had taken a long walk on the hills, eaten a hearty early dinner, and then I lay down on my bed and fell into a heavy sleep, and as I slept I dreamed a very vivid dream. I saw Ralph Jackson lying in his berth on board ship, pale, worn and thin, like one who had recently had a wasting fever; standing by the side of the berth was a man, whom I took to be the ship's surgeon, for he was holding Jackson's wrist in one hand, and a watch in the other; all at once Jackson drew his wrist from the doctor's grasp, and gazed at vacancy (in my dream I could see no object at which he was looking), but a smile, as if of joyful recognition passed over his face, and he reached out his hand and called out feebly, "Borret, Borret," and then said more slowly, "I am dying Borret; Grayson of Rochdale has some deeds of property in Mason street; the proofs you want are with the deeds." Then there was a rush of blood to his pale, thin lips, and he lay back, dead. That was my dream. I awoke with a start to find the afternoon sunlight streaming through the half-darkened window. I felt certain I had seen a vision of what was happening afar off. I looked at my watch; it was four o'clock. I carefully noted down

the words in my pocketbook. My pocket-book lies open on my desk before me as I write this story.

The next morning I took up the law list and found that there was a very old solicitor of the name of Grayson practising in Rochdale. I at once wrote to him asking him whether he had in his office any deeds of property in Mason street which a family of the name of Jackson had once owned; he replied that he had at one time some such deeds and could no doubt trace them.

On the 11th of October, my wife and I and Margaret, then twelve years old, started for Southport so as to be within easy distance of Liverpool. I discovered the owners of the clipper, and they promised to telegraph me as soon as she was sighted off the coast of Wales, so that I could meet her on her arrival in the Mersey.

On the 24th I got a telegram from the owners, that the clipper had been sighted off Point Lynas. I went into Liverpool, and in company with a clerk of the owners, boarded the "Crest of the Wave" as soon as she reached her mooring. The first face I saw on board was the one I had seen in my dream, the ship's surgeon. I accosted him without hesitation.

"You are the ship's surgeon; you have had my friend Ralph Jackson on your sick list; you need not tell me anything, he died on Sunday afternoon, the 22d of September."

"Good God! how did you know it? Is your name Borret?"

"Yes; let me come into your private cabin."

When we were seated there alone he told me the story.

"He was ill when he shipped at Adelaide, like a man broken down with trouble; he seemed intensely anxious to reach England, but I doubted whether he would live the voyage out. He told me he was a widower, and was longing to see his only child before he died; on the voyage he brightened up, and I felt more hopeful. About the time we

crossed the line I fancied he had a slight sunstroke, and soon after that he was down with a fever which baffled all my skill. He had made his will before he came on board and gave it into the care of the captain, as he said 'In case of anything happening.' He complained to me of loss of memory, and I fancied he had something on his mind which worried him. In his delirium he constantly uttered your name, and another name, Ainsworth, and 'Aunt Mary.' Then came the Sunday on which he died."

"Stop, now Doctor, and let me take up the story. I will tell you how the end was; he was lying in his berth, the lower of two berths; you and he were alone; it was in the afternoon between three and four; you were feeling his pulse; suddenly he pulled his wrist away, and said something. I have got it all down in my pocketbook here. Can you remember what he said?"

"He called your name twice, and said something about some one having some deeds of property in some street."

"Here, Doctor, read this note in my pocketbook."

"Mr. Borret, this is indeed marvelous; his very words."

"I will finish the story of his death, Doctor; after he had said these words, there was a rush of blood to his mouth, and he fell back dead."

I then told him the story of my visit to Manchester and of my strange dream, which he said was an exact picture of the final scene, adding, "We buried him in the sea the next day. You shall see the captain, he will show you the entry made in the ship's log and give you the will, and a formal certificate of the death."

Before I left the ship I saw the captain, who gave me the will, which left everything to me as trustee for little Margaret, and made my wife and myself her guardians. I returned to Southport and told the news to my wife, who, after my dream, was quite prepared for the rest of the story, and we com-

forted our little adopted orphan with all that love could give her.

Three days afterwards I went to Rochdale, and saw Mr. Grayson and told him all the story, omitting all mention of the dream. He produced me the parcel of deeds which contained all the proofs wanted to show that Ralph Jackson was a nephew of Mary Jackson who married Ainsworth ; the proofs were in the shape of a declaration made by an old servant of the family, and certificates of birth, marriage and death annexed to the declaration ; more complete proof could not have been desired.

Before I left Mr. Grayson's office he said to me, "As a matter of curiosity how did you come to trace these documents to my office?"

"Ralph Jackson told me himself a month since that I should find them here."

"Told you himself a month since !' Why, on your own statement a month since Ralph Jackson was on board ship on his voyage home, and you were at Georgetown, for you wrote to me from there just a month since ; surely you are making some mistake."

"There are some mysteries, Mr. Grayson," said I "which it is beyond our power to fathom, shrewd lawyers though we may both of us be. If I had commenced my correspondence with you by telling you that it had been revealed to me in a dream that this evidence was to be found in your office, you

would have put me down for a lunatic ; yet here is the evidence, and I can give you my most solemn assurance that neither by letter nor *vivo ore* did Ralph Jackson tell me that I should find it here ; it was revealed to me in a dream."

"Dreams are strange things, Mr. Borret," said Mr. Grayson, "but we know they are not legal evidence as yet ; tell me your dream."

I told him all about it, showing him the entry made in my pocketbook at the exact date, and I told him how all the circumstances which I had seen in my dream, and the words spoken by Ralph Jackson on his deathbed had been confirmed by the ship's surgeon. Mr. Grayson said it was the strangest thing that had ever come to his knowledge during the whole of his fifty years of practice.

I was able to prove Margaret's claim to the full satisfaction of the Duchy authorities, and the money was vested in trustees for her benefit ; and so she turned out a wealthy heiress after all, though her poor father had died broken down with his hard struggle against poverty and want in a strange land.

Now, after twenty years, I have her full permission to tell the story of how her fortune was recovered for her by the means of a revelation from the land of shadows, communicated to me in the course of a Sunday afternoon nap.



THE SCHOOLMASTER'S BIRCH.

- BY THE LATE IRVING BROWNE.

THE law invests the schoolmaster with a high degree of immunity in the matter of beating his pupils. He stands substantially in the place of the parent while the scholar is in school, and even when he is out of school and out of study hours, on the way to or from the temple of learning. It will be less tedious to take the statement of Dr. Johnson as to this law than to cite legal adjudications, for he was strictly accurate in his advice to Boswell on this subject. "Boswell was of counsel for a schoolmaster in Scotland, who had been somewhat severe in his chastisement of one of his pupils, and the case was pending on appeal from the Court of Sessions before the English house of lords, on a proceeding to remove him from his office. The opinion of this most learned of literary philosophers having been solicited, he discovered as follows: 'The government of the schoolmaster is somewhat of the nature of a military government; that is to say, it must be arbitrary; it must be exercised by the will of one man, according to circumstances. A schoolmaster has a prescriptive right to beat, and an action of assault and battery cannot be admitted against him, unless there be some great excuse, some barbarity. In our schools in England, *many boys have been maimed*, yet I never heard of an action against a schoolmaster on that account. Puffendorf, I think, maintains the right of a schoolmaster to beat his scholars.'" (Boyd v. State, 88 Ala. 169; 16 Am. St. Rep. 55.) The court in this case cite several passages from Solomon in support of flogging children. I have never yet seen any cited from Job. Solomon said one thing, which the court did not quote, but which is generally applicable to these cases of whipping scholars, namely: "He that hath no rule over his own spirit is like a city that is broken

down and without walls." There is always danger in delegating the parents' right to chastise the child to a teacher who has no affection for him nor particular interest in him, and who is rendered naturally impatient by the petty vexations of trying to keep a large assemblage of lively and inconsiderate youth in order.

It is very familiar and elementary law that the teacher of a public school has the right to chastise the pupils in moderation for misconduct. *Fitzgerald v. Northcote*, 4 Fost. & Finn. 656; *State v. Prendergrass*, 2 Dev. & Bat. 365; 31 Am. Dec. 416; *Lamler v. Seaver*, 32 Vt. 114; 76 Am. Dec. 156; *Cooper v. McJunkin*, 4 Ind. 290; *Starr v. Liftchild* (significant name!) 40 Barb. 541; *Sheehan v. Sturges*, 53 Conn. 481. In the last case the court observed: "We regard his authority as all but absolute." In the *Fitzgerald* case, Chief Justice Cockburn said: "The authority of the schoolmaster is, while it exists, the same as that of the parent." In all the authorities that I have consulted there is but one breath of discontent with this state of the case. In the *Indiana* case above cited the court observe: "The law still tolerates corporal punishment in the school room. The authorities are all that way, and the legislature has not thought proper to interfere. The public seem to cling to a despotism in the public schools which has been discarded everywhere else. Whether such training be congenial to our institutions and favorable to the full development of the future man, is worthy of serious consideration, though not for us to discuss. One thing seems obvious. The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of his vocation, namely, school government. For such a teacher the nurseries

of the republic are not the proper element. They are above him. His true position will readily suggest itself. It can hardly be doubted but that public opinion will in time strike the ferule from the hands of the teacher, leaving him as the true basis of government only the resources of his intellect and heart. Such is the only policy worthy of the State, and of her otherwise enlightened and liberal institutions. It is the policy of progress. The husband can no longer moderately chastise his wife, nor according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been averted. Why the person of the school-boy, 'with his shining morning face' should be less sacred in the eye of the law than that of the apprentice or the sailors, is not easily explained. It is regretted that such are the authorities—still courts are bound by them." Truly a remarkable discourse on tyranny, coming from a Stuart, judge! On the other hand, Horace Mann, an eminent educational authority, said of corporal punishment: "It should be reserved for baser faults. It is a coarse remedy, and should be employed upon the coarse sins of our animal nature, and when employed at all should be administered in strong doses."

In *Danenhoffer v. State* (67 Ind. 295; 35 Am. Rep. 216), it was held that a boy was justifiably punished for neglecting to carry a note from the teacher to the school superintendent and running home because he feared the note would bring him a trouncing. The note announced that the boy refused to give an excuse for absence from school. His absence was on account of attending the funeral of a child of a Protestant. The school was in charge of Catholics, and as they protested that the whipping was not for that absence but only for refusing to give that as the excuse, the court held them absolved.

In *Heritage v. Dodge* (64 N. H. 297), the master was held blameless for beating a boy for coughing in a manner which he construed

as affected and intended to interrupt and disturb the exercises. In vain the youth offered to prove that "he could not help coughing by reason of a chin-cough." If I had been that boy's father, and believed his story, I would have walloped the master—"beaten the maesther," as John Browdie said in "Nicholas Nickleby"—and justified on the ground of an uncontrollable nervous impulse in my right arm.

In *State v. Mizner* (45 Iowa, 248; 24 Am. Rep. 769), when lacking only fifteen days of being twenty years old, for the purpose of getting into a public school told the teacher that she was twenty. This is a favorite feminine dodge—women tell that tale up to midnight of the last day of the year, if not longer. She was whipped after she became twenty-one, but the court held that her lie entitled her to all the privileges of the school, including that of being whipped after becoming of age and not legally a scholar. She could not voluntarily become a scholar and be free from the penalty of disobedience. Precisely the same was held in *Stevens v. Fassett* (27 Maine, 166). In this case the defendant having been permitted to occupy the master's seat and desk, refused to remove when required, and hence the trouble and eighteen pages in the report. The court thought he did not gain adverse possession of the master's seat and desk, but occupied them only under a revocable license.

The teacher may make rules and require compliance, and chastise for non-compliance, but they must be reasonable rules. Thus in *State v. Vanderbilt* (116 Ind. 11; 9 Am. St. Rep. 820), it was adjudged that a teacher has no right to make a rule requiring pupils to pay for school property wantonly or carelessly destroyed by them, and whip them for not complying. The case does not disclose what the property was. But the court remarked that no child should be punished for carelessness, for it is a common and not very blameworthy fault; and that as few children have money, and if the parents or guardians

had none or refused to pay, the child would suffer in his person "for not having done what he had no power to do." All of which is sensible and humane. The same doctrine is declared in *Holman v. Trustees* (77 Mich. 605; 6 L. R. A. 534), where a boy of ten was expelled for carelessly breaking a pane of glass. In that case the court remarked that it would have been cheaper for the father to mend the window, "but he saw fit to stand upon his rights, as he was privileged to do."

An amusing question arose in *State v. Board of Education* (63 Wis. 234; 53 Am. Rep. 282). There was a rule that every scholar on returning from recess should bring in a log of wood for the fire. One boy refused to become like Fornando, in *The Tempest*, a "patient log-man," and he was suspended. On mandamus he was restored. The court held that this rule was not "needful for the government of the school," any more than a requirement to saw and split wood, clean the sidewalk or wash the windows. So the lad "made it hot" for the teacher without lugging in the wood. Another impatient log-man was Eddy Patrick, sixteen years old, in *Vanvactor v. State* (113 Ind. 276; 3 Am. St. Rep. 645). He was required by the teacher to bring in wood and put it in the stove, and while complying made "antic demonstrations" behind Vanvactor, which created a laugh. Vanvactor then made him stand up by the stove a considerable time. When school closed, Eddy claiming that he was in a sweat not only put on his own overcoat, but the teacher's over that, and started for home. Teacher sent a boy after him to demand his coat, but Eddy refused to surrender it and wore it home, and teacher had to go home overcoatless and cold. For this trick he whipped Eddy next day, with a green switch three feet long, forked near the middle, forming two limber prongs. By agreement the whipping was after school hours and in private. A conviction of assault was reversed, on the ground

that Eddy got less than he deserved because the punishment was private, and in a way consented to by the sufferer.

An interesting inquiry is, how long is the schoolmaster's birch? There is a very severe class of cases in which the master is held justified in chastising the pupil out of school hours, on his way to or from school, and even while engaged in his father's service. The leading case, *Lamler v. Seaver* (*supra*), goes to the last length. The offending boy, an hour and a half after the close of school, after his return home was driving his father's cow past the master's house, and in presence of some fellow-pupils and of the master, called the latter "Old Jack Seaver." For this old Jack walloped him with a rawhide next morning at school. And the court said, "served him right," because this conduct "had a direct and immediate tendency to bring the authority of the master over his pupils into contempt," etc. This is carrying the contempt doctrine very far, and much beyond what would be tolerated in regard to judicial contempt. We think it a foolish decision. Followed to its logical conclusion, it would justify the master in beating a little boy for hugging and kissing a little girl, member of the same school, at a frolic or a husking bee, especially if he should say, "Dam master!"—for this would be conduct tending to bring the teacher's authority into contempt. By the same reasoning a judge would have a right to adjudge a disgruntled lawyer in contempt for swearing at "old straps" at the tavern and ridiculing his adverse decision between drinks. Another decision of this sort was in *Deskins v. Gose* (85 Mo. 485; 55 Am. Rep. 387), where the teacher was upheld in whipping a boy for quarreling and profanity on his way home from school. The court seemed to deem it the duty of the teacher to deliver the lad at home in good moral order. This doctrine prevails also in Texas as to fighting out of the schoolhouse and out of school hours. (*Hutton v. State*, 23 Tex. Ct. App. 386; 59 Am. Rep.

776.) In *Bunlick v. Babcock* (31 Iowa, 567), the court remarked *obiter*, that sports beyond school might be forbidden if they tended to unfit a pupil for study during school hours, and that a contrary view "is narrow, and without regard to the spirit of the law and the best interest of our common schools." According to this doctrine, authorities might forbid foot ball or boxing or rowing. This was founded on the leading Vermont case, and on *Sherman v. Inhabitants of Charlestown* (8 Cush. 160), where Chief Justice Shaw held that a female scholar might be excluded from school on account of "licentious propensities, language, manners and habits, amounting even to actual prostitution, although not manifested in the school"—which is a horse of another color. But in *Bolding v. State* (23 Tex. App. 172), Wilson, J., out-Herods Herod by asserting that "the teacher's authority extends to the prescribing and enforcement of reasonable rules and requirements even while the pupils are at their homes!" How if the parent made a contrary rule? In the Vermont case above, the court conceded that ordinarily the teacher's authority ceased on the arrival of the child at his home, for then the parental authority is renewed, but the offence of the "bucolical juvenal" was so gross and contemptuous of the teacher that an exception was made. The doctrine of the resumption of parental authority was recognized in *Drill v. Snodgrass* (66 Mo. 286; 27 Am. Rep. 343), where it was held that school directors had no warrant to make a rule forbidding pupils to attend social parties, and to expel a scholar for attending one with the consent of his parents.

Sometimes the will of the parent is allowed to prevail against that of the pedagogue. Thus in *Morrow v. Wood* (35 Wis. 61; 17 Am. Rep. 471), it was held that the teacher was not justified in flogging a child for refusing to study geography, in which he had the support of the parent. Perhaps the parent had conscientious scruples against the use of

globes, and having his child taught modern scientific theories of cosmography in contempt of the scriptures and the fathers. The court remarked: "It is one of the earliest and most sacred duties taught the child, to honor and obey its parents. The situation of the child is truly lamentable, if the condition of the law is that he is liable to be punished by the parents for disobeying his orders in regard to his studies, and the teacher may lawfully chastise him for not disobeying his parent in that particular." "We see no reason whatever for denying to the father the right to direct what studies, included in the prescribed course, his child shall take. He is as likely to know the health, temperament, aptitude and deficiencies of his child as the teacher, and how long he can send him to school." This is also the doctrine of *State v. Mizner* (50 Iowa, 145; 30 Am. Rep. 129), when the court said: "Compulsory education is not yet the rule in this State." Here the labored branch of learning was algebra. In *Trustees v. People* (87 Ill. 303; 29 Am. Rep. 55), it was held that a pupil was not liable to exclusion because his father did not wish him to study grammar. I have strong sympathy with that father, for much time is wasted in the schools over the study of grammatical analysis, with the result that pupils can analyze a sentence to pieces and yet habitually speak bad grammar. But in *State v. Webber* (108 Ind. 31; 58 Am. Rep. 30), it was held that the master might expel a scholar for refusing to study and practice music, although his refusal was with his father's approval, and the same was held in *Guernsey v. Pitkin* (32 Vt. 224), in respect to English composition, the court quoting Lord Bacon's apothegm, that "writing makes a correct man." In regard to the music case, Mr. Bishop observes (*Non-Contract Law*, sec. 594): "Many a child could acquire no useful knowledge of music during his entire minority, if every wakeful moment was devoted to it, and to compel such a throwing away of valuable time is a tyranny which

ought not to be possible in any free country." To which the present writer heartily assents.

As to what constitutes moderate and reasonable chastisement we find several significant recent decisions. In *Whitley v. State* (33 Tex. Cr. Rep. 172), the court deemed sixty-three blows excessive, although even then the obstinate young rascal refused to give in. And in *Boyd v. State* (88 Ala. 169; 16 Am. St. Rep. 31), where the teacher got mad, declared he "could whip any man in China Grove beat," and after the offending pupil had apologized for his improper language, and left the schoolhouse, followed him into the yard, struck him on the head with a stick and hit him three "licks" in the face with his fist, closing one of his eyes for several days, and declared he "would conquer or kill him," it was held immoderate and a conviction was affirmed. This outbreak cost master \$25, besides his lawyer's fees. In *State v. Mizner* (50 Iowa, 145; 30 Am. Rep. 128), it was held that the scholar had a right to know for what offence she was whipped. Here the scholar was a girl a little above twenty-one years of age, and she was flogged with a "hickory," four feet long, the master "rising on his toes" and giving a dozen blows producing marks that lasted two months, all for "sass." In *Fertich v. Michener* (111 Ind. 472; 60 Am. Rep. 709), it was held unreasonable to lock the doors and keep a child out in the cold, at eighteen degrees below zero, for fifteen minutes during the opening religious exercises, whereby her feet were frozen. What a satire on the Godly parade going on inside! But the teacher was absolved because it was not shown that he acted wantonly or maliciously. In the case of *Anderson v. State* (3 Head. 455; 75 Am. Dec. 744), a small boy, attending school for the first day in his life, said in a low tone of voice, "four and one make five." The teacher asked who spoke, and the small boy owned up, said he spoke before he thought, would not do so any more, and began to cry. Teacher told him no ex-

cuse would do, and ordered him to pull off his coat, and "hit him about a dozen licks with a switch about as large as his thumb or finger, and two or three feet long." The witness thought "the little boy had never heard the rules of the school." The poor little fellow was assaulted for declaring a mathematical axiom. The court said, "his apology, repentance, and promise to do so no more ought to have saved him from the lash." They pronounced the chastisement cruel and unauthorized, and very wisely observed that such things "are calculated to produce the deeds of violence against teachers which so often occur on the part of the parents and brothers of students."

But what constitutes excessive punishment should not be left to the judgment of "all hands," as was charged in *Patterson v. Nutter* (78 Maine, 509; 57 Am. Rep. 818). "The general judgment of reasonable men" is the criterion, as was held in *Lamler v. Seaver* (*supra*). The opinion of "the stupid and the ignorant, as well as the rational and intelligent," is not a proper test.

One of the best things that have ever been accomplished in the conduct of our public schools is the disuse of corporal punishment. It has been abolished in the Army as a punishment for crime, in the Navy, in many of the prisons, and it is utterly indefensible in the schools. It is degrading to him who administers, as well as to him who suffers it. The father who would whip his child whenever and because he was flogged at school, as an old-fashioned father did, would deserve to be run through a threshing-machine. Our cheeks still burn with indignation as we peruse Charles Lamb's denunciation of his flogging master, and it is curious to read Holmes's account in "Elsie Venner" of the physical triumph of the young master over the riotous young bully. Neither morals nor manners nor learning can be beaten into any reasonable human being. It is a foul imputation on Nature that one can never see or hear of one of her most beautiful trees

without being reminded of an old-time school-master and sometimes not without reminiscent bodily pangs and hot flashes of anger. There is undoubtedly better order now in the public schools than in the days of the birch. The painter and the novelist have had much to do with this. Cruikshank's picture of the terrified boy, "horsed" on the back of the grinning assistant, with the rag-

ing master flying at him with a bundle of rods, was an object lesson of great efficiency. Marryat claimed that the horrible barbarity of flogging around the feet, depicted in "The King's Own," was considerably ameliorated by that novel, and we all know what Dickens' picture of "Dotheboy's Hall," in "Nicholas Nickleby" did for the abolition of school cruelties.

MODERN INTERNATIONAL LAW PROBLEMS.

III.

INTERNATIONAL OCCUPATION.

THE questions we have hitherto considered — exterritorial jurisdiction and foreign divorce — have belonged to the province of "Conflict of Laws." We may turn now with advantage to a problem in Public International Law — pure and simple — the doctrine of International Occupation.¹ Nearly every civilized power has, in modern times, participated in the race for empire. Some jural basis for the struggle had to be found, and as was to be expected in a case where action came first, and its justification had to be discovered afterwards, various jural bases for these natural expansions have been put forward. The earliest view was that discovery gave a title to countries inhabited by uncivilized nations. (See Salomon's *L'Occupation des Territoires Sans Maîtres*). It was probably under the influence of this conception that Pope Alexander VI. (Roderic Borgia) issued his Bull, of May 14, 1493, purporting to divide the whole undiscovered non-Christian universe between Spain and Portugal. The replies to this Papal thunderbolt from the non-Roman Catholic world were the grant by Queen Elizabeth of England of the first of the East India company's charters (1600) and the formation of the

powerful Dutch East India company (1602) which combined the associations of Dutch merchants who had fitted out two great expeditions to Java by the Cape in 1595-1596 and 1598-1599. Soon, however, a second theory, different, but derivable from the first, began to manifest itself. Nations based their title to sovereignty over new countries from "occupation" — occupation by the way which might be merely *oculis et affectu*.

"The acts" says Mr. Macdonell (*ubi supra*), "relied upon might be the hoisting of a flag, the erection of a mound or cross, the firing of a salute, the purchase of a treaty in exchange for rum, beads, or knick-knacks from a chief who professed to sell what he did not always own. In every dispute as to boundaries or territory, these two theories are still brought forward, and in the majority of books the latter, in some form or other, is still the dominant theory."

It is not difficult to see how occupation came to secure for itself this prominent place in the controversy. Early writers on international law assumed that the rules of private Roman law could be applied to the transactions of States and that such rules were sufficient to cover the field of international relations. From many points of view the assumption was justified. "Instructive analogies were suggested. There

¹ See an admirable paper on this subject in the *Journal of the Laws of Comparative Legislation*. N. S. 2.

are ideas and rules common to both international and private law. Many of the principles regulating contracts or torts are equally applicable whether States or private persons are concerned. In many matters the State is in truth the individual writ large." (Macdonell, *ubi supra*.) And even where this assumption was not in vogue, the feudal ideal, wherever it existed, tended to make the boundary between rights of dominant ownership hard to draw. But the theory itself only diverted attention from the real issues to be determined. In the Portuguese case, for instance, with reference to Delagoa Bay, reliance was placed on texts in the Code (7, 32, 4) which favored a title, unsupported by recent acts or exercise of authority. Would any civilized nation nowadays submit to a claim of this kind? Again, according to Roman law, possession of a part, which is not severable from the rest of the property is possession of the whole. Can this conception be applied to modern international relations? Is the presence of a government at one point in a territory — the existence of a fort, for example, or a custom house — inconsistent with the independence of the inhabitants in other parts of it? Every one knows that it is not. Or again, can the regulations of private law as to prescription be applied to international law. It is obvious that no hard and fast line can be laid down.

"There are essential differences," says Lord Salisbury, P. P. 1896 — c. 8105 — p. 12 "between individual and national rights to land which make it almost impossible to apply the well-known laws of real property to a territorial dispute. Whatever the primary origin of his rights, the national owner, like the individual owner, relies usually on effective control by himself or through his predecessor in title, for a sufficient length of time. But in the case of a nation, what is a sufficient length of time, and in what does effective control consist? In the case of a private individual, the interval adequate to make a valid title is defined by positive law. There is no enactment or usage or accepted doctrine which lays down the length of time required for in-

ternational prescription; and no full definition of the degree of control which will confer territorial property on a nation has been attempted. The great nations in both hemispheres claim, and are prepared to defend, their right to vast tracts of territory which they have in no sense occupied and often have not fully explored. The modern doctrine of "Hinterland," with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control."

In order to make the Roman doctrine of occupation square with the facts, fictions had naturally to be resorted to, and so there were introduced distinctions as to national occupations conferring sovereignty, while individual occupations did not do so; as to occupation *per universitatem* and *occupatio per fundos*; and between actual and constructive occupation and occupation by reason of contiguity. The theory of a primitive division of land played its part in the evolution that was going on.

"It may be admitted," says Mr. Gallatin (Oregon Case, Barrow 4, c. 6, § 2), "as an abstract principle, that in the origin of society, first occupancy and cultivation were the foundations of the right of private property and private sovereignty. . . . As in every society it had soon become necessary to make laws regulating the manner in which its members should be permitted to occupy and to acquire vacant land within its acknowledged boundaries, so also nations found it indispensable, for the preservation of peace and for the exercise of distinct jurisdiction, to adopt, particularly after the discovery of America, some general rules, which should determine the question, 'who had a right to occupy.'"

Nowadays, however, "effective occupation" is insisted upon. The term marks a decided advance on the old theories; and occasionally we get a statement of the real issue which is the presence or absence of control. For example, in the English "case," with respect to Delagoa Bay, it was argued that the erection by the Portuguese of a fort at the mouth of the river Zambesi did not ne-

cessarily confer on them sovereignty over the whole district which they claimed :

"As far as the governor of the fortress can and does exercise authority and jurisdiction, so far as the country and its inhabitants are under the control and government of the country to which that fortress belongs, that control and government close at the moment and at the places where the jurisdiction no longer exists and the authority no longer is, or can be, exercised."

There remains to be noted the theory of natural boundaries which figured, early in the century, in the dispute between Spain and the United States as to the boundaries of Louisiana. Louisiana claimed as assignee of the rights acquired by Le Salet, a Frenchman, who had discovered the Mississippi and the waters flowing into it. The American commissioners in the course of the discussion propounded the following rules :

"The first of these is, that when any European nation takes possession of any extent of sea coast, that possession is understood as extending into the interior country, to the sources of the rivers emptying within that coast, to all their branches, and the country they cover, and to give it a right in exclusion to all other countries to the same. It is evident that some rule or principle must govern the rights of European Powers in regard to each other, in all such cases, and it is certain that none can be adopted in those cases to which it applies more reasonable and just than the present one. Many weighty considerations show the propriety of it. Nature seems to have destined a range of territory so described for the same society, to have connected its several parts together by the ties of a common interest, and to have detached them from others.

"If this principle is departed from, it must be by attaching to such discovery and possession a more enlarged or contracted scope of acquisition ; but a slight attention to this will demon-

strate the absurdity of either. The latter would be to restrict the rights of a European Power, who discovered and took possession of a new country, to the spot on which its troops or settlements rested—a doctrine which has been totally disclaimed by all the Powers which have made discoveries and acquired possessions in America. The other extreme would be equally improper ; that is, that the nation who made such discovery should, in all cases, be entitled to the whole of the territory so discovered. In the case of an island, whose extent was seen, which might be sailed round and preserved by a few forts, it may apply with justice ; but in that of a continent it would be equally absurd."

"The second principle is, that whenever one European nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where the territory between them is not determined by the principle above mentioned, the middle distance becomes such of course. The justice and propriety of this rule is too obvious to require illustration.

"A third rule is, that whenever any European nation has thus acquired a right to any portion of territory in that continent, that right can never be diminished or affected by any other Power, by virtue of purchases made, or by grounds of conquest of the natives within the limits thereof."

As an instance of an attempted application of the first rule, see Oregon Claims (Parl. Pap. 1846, Vol. 52 ; 1873, Vol. 74). There is now a distinct tendency among international jurists to insist that in the settlement of boundary disputes account shall be taken *operis paribus* of the natural lines of division. The special consideration of the allied subject of *territorium nullius* dealt with by Mr. Macdonell in the brilliant article which we have taken as a text for the present may with advantage be postponed till the Venezuela Guiana case has been decided.

Lex.

ESQUIRES AND GENTLEMEN.

IN common parlance we suppose every man is addressed as an esquire at the present time, even if letters sent to his shop or warehouse are more generally addressed simply to John Smith, or perhaps Mr. John Smith. Some few generations back there was a true distinction which had not fallen into desuetude. Originally the term esquire (armiger, or in French *escuyer*) denoted a gentleman holding rank immediately below a knight. It was therefore a military office, the holder being the person who acted as the knight's body attendant and shield bearer. A favorite esquire was often rewarded upon the conclusion of the campaign by gifts of lands and goods, together with the privilege of bearing some armorial design. We see, therefore, so far, two varieties of esquire — one being a person acting as armor bearer for another, the other being an armor bearer for himself. From the creation of this latter class has flowed the more modern custom of dubbing every person an esquire who might by the ingenuity of the heralds be regarded as a potential bearer of arms.

Strictly speaking, there are seven ranks of real esquires. The first of these are esquires of the King's body; secondly, there are the eldest sons of knights and their eldest sons born during the lifetime of the former. This class arose from the custom prevalent in ancient times for the knight to employ his eldest son as his shield bearer in order to give him some apprenticeship to military service. Thirdly, there comes the eldest sons of the younger sons of peers; fourthly, there are persons invested by the Sovereign with the collar of S. S. These were collars studded with many of that letter in links worn by persons holding great state offices. It is believed that the Lord Chief Justice, the Lord Mayor of London, Kings-at-Arms, Serjeants-at-Arms, and heralds still wear these collars. From a "Glossary of Terms in British Her-

aldry," published about half a century ago, it appears that the signification of the letter is far from clear. It is conjectured that the letter of this collar, originally a badge of the House of Lancaster, denotes Souerayne, the favorite motto of Henry IV. Be this as it may, it seems sufficiently clear that the Sovereign was wont to create esquires by investing them with this collar and a gift of silver spurs. Silver was the distinction of the class, as the gilt spur was peculiar to the knight-hood. In the fifth class, Lower's "Curiosities of Heraldry" place esquires to the Knights of Bath, for life, and their eldest sons. In the sixth class we find sheriffs of counties for life, coroners and justices of the peace, and gentlemen of the Royal Household, so long as they hold their office. It appears that in this class must also be included judges and the higher naval and military officers whose patents designate them as esquires. Within the seventh class we find an answer to part of the question put by our correspondent. Barristers-at-law; doctors of divinity, law, and medicine, mayors of towns savor of scutarial dignity, but are not, strictly speaking, esquires. They are considered to rank as esquires, and to be on a strict equality with them, but they are not, it is conceived, upon the authorities mentioned, esquires in the accurate use of the expression.

It is only fair to mention that other authorities vary the enumeration which we have given above, the whole subject being one almost forgotten in the antiquarian lumberheap. Examination and comparison of several of these works seem to justify one in accepting the classification set forth in Lower. The dictionaries in common use seem to differ slightly amongst themselves. Ogilvie appears to regard the barrister as a genuine esquire, as does also the new "Oxford Dictionary;" the ninth edition of the "Encyclo-

pedia Britannica" also says that he may legally use the description. Probably the distinction alluded to above furnishes the key to these diverging views, the result being that, though not esquires, they are entitled to use the title, perhaps much in the same way that the bachelors in certain university faculties are by courtesy permitted to be called doctors. It is believed that in the United States the expression esquire is used only in reference to the Legal Profession and certain Government officials. In concluding these remarks upon this branch of our subject, it may be usefully remarked that there is a popular fancy, more especially in the provinces, that persons enjoying a substantial income from landed property, or whose lineage is ancient, are entitled to this style. This probably takes origin from yeoman being owner of "free land of forty shillings by the year" and being a *probus et legalis homo*. It is clear that such persons may belong to the class of gentleman. Not all the latter are esquires, though every esquire is a gentleman, the whole being greater than the part.

The term "gentleman" was only used as a legal expression about the reign of Henry V. It seems extremely elastic in its definition, but denoted originally every person of noble descent—*i.e.*, *generosus*. It seems, according to a dictum of Sir Thomas Smith, to include any one studying the laws of the realm, every university student, every member of a liberal profession—in short, every person "who can live idly and without manual labor." There is a quaint old book in the Inner Temple Library (bearing on its cover an indorsement that it belonged in the reign of Elizabeth to one Johnson). In this work on the "Blazon of Gentry," by Sir John Ferne, it is held, at page 89, that the following comprise in heraldry the class of gentleman, viz., gentlemen of ancestry whose ancestors have borne coat armor for five generations; gentlemen whose coat armor department is unimpeachable, but of ancestry doubtful, having, however, an ancestor in the fifth degree who

slew a Saracen or who won a standard or coat of armor from a Christian gentleman; again, a person whose Sovereign has given him arms, or a person who has bought an estate to which arms appertained. There are included in this section yeomen worthily holding arms and knighthood and yeomen being doctors of laws and possessing coats of arms. Then there come the younger members of a house of which the elder line has failed after a lineal succession of five generations, gentlemen whose blood and coat of arms are alike imperfect, natural sons of gentlemen thus perfect, gentlemen who have slain infidel gentlemen, and, lastly, gentlemen who have neither blood nor coat armor. These individuals comprise students of common law, churls made priests and canons, persons brought up in the service of a bishop, abbot, or baron, and he that, having received a degree or borne some city office, is entitled to be saluted as master. Thus might one extend indefinitely the coils of infinite complexity and humbug in which the question of squiredom and gentlemanship have been involved by time and heraldry. The motto of William of Wykeham, the motto of Winchester and New College, is simpler and truer: "Manners makyth man."

We might also refer to another quaint work upon which we stumbled in the same library. It is entitled "Heraldic Anomalies," by "It Matters not Who," and was published in 1823. The writer here recalls some lines upon the Winged Horse and the Lamb, the respective insignia of the Inner and Middle Temple, which are said to have been chalked up by some wag upon one of the public gates. They ran as follows:

As by the Templars' holds you go,
The Horse and Lamb display'd,
In emblematic figures show
The merits of the trade.

That clients may infer from thence
How just is their profession,
The Lamb sets forth their innocence
The Horse their expedition.

Oh, happy Britons! happy isle!
 Let foreign nations say,
 Where you get justice without guile
 And law without delay.

There are, it is to be feared, some persons, both lawyers and laymen, who would subscribe to the following rejoinder by some dissenting humorist:

Deluded men, these holds forego,
 Nor trust such cunning elves;
 These artful emblems tend to show
 Their clients, not themselves.

'Tis all a trick; these all are shams
 By which they mean to cheat you;
 But have a care, for you're the lambs,
 And they the wolves that eat you.

Nor let the thought of "no delay"
 To these their courts misguide you;
 'Tis you're the showy horse, and they
 The jockeys that will ride you.

This same book mentions a curious trial in which the question of a person's right to the title of gentleman was at stake. It seems a horse race had been run, the condition being that each rider should be a gentleman. The winner, a man of some seventy years of age, was challenged as not complying with this condition. The matter came before the court in the evening, the other competitors, young men of large fortunes and M. P.'s, being subpœnaed as witnesses. They came into court after a libation at an hotel, by no means sober, booted, spurred, splashed, and dirty from their ride into town. The delay in hearing the case caused them to become rude to the judge, the jury, and the counsel for the defendant. The latter began his speech by saying that he feared

he must throw up his brief, for he despaired of proving his client to be a gentleman when he saw the conduct of persons who, from the nature of the case, must be presumed to be beyond dispute gentlemen. He remarked that in comparison with these persons his client was at a disadvantage, inasmuch as he was sober and respectful to the court. He was, moreover, clean, decent, and in comely apparel. Judging by these appearances, and comparing his client with these gentlemen, he feared that he must give way, inasmuch as being sober, civil, and cleanly, he could not be such a gentleman as they were. His client was also degraded, for his income was small, but entirely unencumbered; nor did he ever exceed it nor squander it, never gambled, never ran into debt. He brought up his family in a plain and frugal manner, he set them the example of a moral and religious life. He was, in fine, a good Christian, husband, father, master, neighbor, and friend. The learned counsel further stated that it was in respect for a promise to a dead friend's son that he rode in the race, and concluded that it remained for the court and jury to say whether his opponents were right in holding that his client did not come up to their ideas of a gentleman. It appears that this sarcastic tirade was successful, the satisfactory decision being hailed with the loudest acclamations. The identity of this advocate is not revealed, but the book states that the trial took place not long before 1823, and that he rose to one of the highest positions in Westminster Hall and to the dignity of a peerage.

—*The Law Times.*

LONDON LEGAL LETTER.

LONDON, April 5, 1900.

TWO matters of general interest have recently engaged the attention of the legal profession in this country. One of them raises, under somewhat peculiar circumstances, the question of what constitutes contempt of court, and whether a newspaper attack—vulgar, abusive and marked by a wanton desire to wound and offend—on a judge, constitutes such contempt, the article having appeared after the pending cause which had been made the occasion of it was finished. The facts are briefly these. On the 15th of March last, Mr. Justice Darling while presiding in the Assize Court at Birmingham, made some remarks by way of warning to newspapers. He was about to try a case of a very unpleasant nature, and he reminded the reporters that they were not free to publish the reports of unseemly details or evidence of disgusting facts merely because such evidence had been given in a court of law. His remarks appear to have given general offence to the press of Birmingham whose editors resented the imputation that without such warning they would print the prominent details of an indecent case, or that they needed any instruction from the bench as to the conduct of their newspapers. One of them, the *Daily Argus*, used the day after the trial of the action, the following language:

The terrors of Mr. Justice Darling will not trouble the Birmingham reporters very much. No newspaper can exist, except upon its merits, a condition from which the Bench, happily for Mr. Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horsehair, a microcosm of conceit and empty-headedness who admonished the Press yesterday. It is not the credit of journalism, but of the English Bench, which is imperilled in a speech like Mr. Justice Darling's. One is almost sorry that the Lord Chancellor had not another relative to provide

for on the day that he selected a new judge from the larrikins of the law. One of Mr. Justice Darling's biographers states that an eccentric relative left him much money. That misguided testator spoiled a successful 'bus conductor. Mr. Justice Darling would do well to master the duties of his own profession before undertaking the regulation of another. There is a batch of Quarter Sessions prisoners awaiting trial which should have been dealt with at this Assize. A judge who applies himself to the work lying to his hand has no time to search the newspapers for indecencies.

It may be remembered that when Mr. Justice Darling was appointed a judge, two or three years ago, there was a general criticism of the appointment on the ground that it was of a political nature and that his position at the bar and his lack of practice did not merit such distinction. As a matter of fact he has proved an unusually sound, careful and painstaking judge and in the estimation of many of those who oftenest appear before him will in the near future take high rank among his colleagues. He certainly could at the present time give lessons to most of them in urbanity, patience and courtesy to counsel.

The publication of the article could not pass unnoticed and the Attorney General accordingly moved before two judges to the Queens Bench Division, for a peremptory order that the Secretary and Chief Executive officer of The *Daily Argus* Company should attend before the Divisional Court to answer for the contempt committed by him in publishing the article in question. The Attorney General stated that he might have applied for a rule *nisi* for attachment but he thought the motion for an order to compel the attendance of the offending person was more in accordance with the practice. The order was granted and upon the day named the editor of the paper, a Mr. Gray, appeared, the Secretary of the company being abroad

and having no knowledge of the incident. As the case was deemed of unusual importance the Lord Chief Justice joined the two Judges of the Divisional Court and presided at the hearing. No defence was made in law; Counsel for the editor simply making an appeal *ad misericordia* and reading the affidavit of the editor in which the latter made as humble an apology as it was possible to frame. To the disappointment of the members of the bar who thronged the court to watch the proceedings the Lord Chief Justice did not refer to the question of contempt or attempt to decide whether the article, which it was admitted was not published until after the case in which Mr. Justice Darling had made his observations had been disposed of, constituted in fact contempt of court. He confined his remarks to the impropriety of the article and the consequences which would inevitably result if such scandalous abuse of a judge was permitted to go unpunished. He then fined the editor \$500 and the costs, which probably amounted to as much more, and ordered that he stand committed to prison until the fine was paid. There was an arrest of judgment until later in the day when the money was forthcoming and the prisoner was discharged.

Although the result, so far as the punishment of the author of the disreputable article is concerned, was satisfactory, it is to be regretted that there was not some expression of judicial opinion that would indicate that this decision should not be invoked as a precedent to establish the new proposition that mere vulgar abuse of a judge is contempt of court. In the old days there was a kind of contempt which, in the language of a century ago, was called "scandalizing the court itself," but the privy council has recently decided in *McLeod v. St. Aubyn*, (1899, Appeal Cases, 549), that punishment for such offences has become obsolete in this country, and that judges are now satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. If, however,

they are of such a nature that they cannot be overlooked, then the judge, like every other member of the community, must resort to an action for libel or criminal information for his vindication.

The same rule would seem to prevail in the United States where in half a dozen cases in as many different States it has been held that a slanderous or libellous publication concerning the judge in relation to an act already done or a decision rendered, cannot be published by the court as a contempt. However criminal the publication may be it lacks that necessary ingredient to constitute a contempt, of tending to prejudice the cause or to impede its progress.

The other matter which has excited comment among the members of the bar is a remark made from the bench by the Lord Chief Justice as to speculative actions. In this country any solicitor who was known to take up a case on a contingent fee would be very severely dealt with, and any barrister who permitted a solicitor to mark upon his brief a fee with the understanding that it was not to be paid except in the event of success, would undoubtedly, if the fact became known, be unfrocked by his inn. In the trial of actions for damages for personal injuries an intimation that the cause is speculative will greatly prejudice it both with the judge and the jury. To such an extent does this prejudice go that only a few months ago one of the judges ordered a solicitor who had brought an unsuccessful action on what appeared to be speculative terms, to pay the costs out of his own pockets. As these costs involved not only those payable to the court but the fees of the opposing counsel the order amounted to a fine of at least \$500 for starting the speculative action. However, it is hardly likely that such an order will be again made after the dicta of the Lord Chief Justice. In a case tried before him a few days ago in summing up to the jury he remarked that "he thought it right to say, on the part of the profession and the class of persons who

were litigants in such cases, that it was perfectly consistent with the highest honor to take up a speculative action in this sense—viz., that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a *bona fide* cause of action, it was consistent with the honor of the profession that the solicitor should take up the action. It would be an evil thing if there were no solicitors to take up such cases, because there was in this country no machinery by which the wrongs of the humbler classes could be vindicated. Law was an expensive luxury, and justice would very often not be done if there were no professional men to take up their cases and take the chance of ultimate payment; but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed."

This may satisfy the conscience of the solicitor, but it will raise an interesting question as to the duty of counsel under the cir-

cumstances. Is he, too, to make his compensation dependent upon success, or is the solicitor to take the whole responsibility and guarantee the payment of the fees he marks upon his advocate's brief? And a still more interesting question was to the effect this opinion of the Lord Chief Justice will have upon this class of actions. At present they constitute only a small part of the volume of litigation, and the damages which are recorded are so small in amount as to make it hardly worth the while of the lawyers to collect them. It is argued here that speculative actions for damage for personal injuries have become so numerous in the United States and the verdicts are so large that they are a great detriment to the community, and that the old rule under which up to this time they have been discouraged in this country is a blessing to the general public, even if it may occasionally work hardship to the legal profession and an occasional litigant.

STUFF GOWN.



The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

FACETIÆ.

OLD LADY (reading newspaper): "I declare! The poor fellow arrested yesterday is deaf."

LISTENER: "How do you know?"

OLD LADY: "Why, it says here that he is expected to have his 'hearin' next week."

"YOUR lawyer made some pretty severe charges against the other fellow, didn't he?"

"Y-e-s; but you ought to see how he charged me."

"I'D GIVE five years of my life to get out of this scrape," said the prisoner at the bar.

"I'll let you out with three," said the judge as he passed sentence.

"I UNDERSTAND you were well off before you married," said the lawyer.

"Yes," replied the witness, "but, like a fool, I didn't know it."

NOTES.

THE railway company running up Pike's Peak was recently sued by a woman for damage to her ranch caused by a fire which was started, as alleged, by one of the engines of the railway company. The railway company, amongst other defenses, alleged that large numbers of tourists were accustomed to use, without its consent, the right of way of defendant company for a passageway upon which to walk to the summit of Pike's Peak; that these people were accustomed to build fires upon, and off from, and adjacent to the right of way for the purposes of warming themselves and preparing their luncheons, and claimed that the damage, if any, was caused

from such a fire. Plaintiff tried to strike this out from the answer and being unsuccessful evolved, amongst other replies, the following, which is too rich to be lost amongst the dusty files of a Colorado court. The "Baby Nell" referred to was a famous burro that was buried on the top of Pike's Peak.

"And this plaintiff is informed and believes, and upon information and belief alleges, that said railroad of the defendant runs through romantic and historic ground, that long before the soil thereof was disturbed by a soulless corporation and the rocks thereof echoed back the whistle of a grasshopper engine or the sweet music of the Rocky Mountain canary,—yes, long prior to the time when Zebulon Pike gazed from afar off upon the snowy top of old Pike's Peak, or before Major Long stood where Pike only gazed and Baby Nell now sleeps, even before the time when the noble Ute came whooping around its base to drink the bubbling waters ere they were polluted by the microbes of the unhealthy white man, fires were built off of the right of way of the defendant, even so far off from said right of way as on Mexitili's soil, ere the heathen poet plucked the pinions of the king of birds and wrote therewith the following touching lines:

"Harken! Up the Rio Bravo
Comes the Negro catcher's shout,
Listen, 'tis the Yankee hammers
Forging human fetters out.
From the seller of God's image,
From the trafficker in man,
Mother, Gracious Mother Holy!
Shield thy dark browed Mexican.
On they come the mad invaders,
Like the fire before the wind,
Freedom's harvest fields before them,
Slavery's blackened wastes behind.

"But this plaintiff denies that said fires, or any of them, were the fires that caused the damage to, and burned the timber of this plaintiff, as alleged in her said complaint.

"This plaintiff, further replying, alleges that this plaintiff is informed and believes, and upon information and belief alleges, that subsequent to the said 15th day of May, A. D. 1899, parties have not only ascended to the summit of Pike's Peak, but they have also descended therefrom, and both in the ascent thereof and descent therefrom said parties have partaken of coffee and other refreshments while toasting their shins before the fires built off from the right of way of the defendant; that some of said parties have walked up and down said mountain, while others have gone up and down on their burros, and still others have ascended and descended said mountain on the burros of others and of divers and different persons who abide in the City of Manitou and the surrounding country and make their livelihood by hiring out their burros for such purposes; and this plaintiff further alleges that it is the belief of this plaintiff that generations yet unborn will so ascend and descend said mountain rather than pay the exorbitant charges made by the defendant for carrying people up said mountain on its said railway, and that said persons have wrestled with, and will wrestle with Colorado Springs' restaurant sandwiches and have washed them down and will wash them down, with coffee and Colorado city liquids rather than pay \$1.05 for a slice of bread and a glass of milk, with the privilege thrown in of gazing upon the lonely grave of the aforesaid Baby Nell while disposing of the luncheon so gotten, and while so doing the wrathful fires of indignation will kindle, blaze and burn within the bosoms of said persons and off from the right of way of the said defendant, but this plaintiff denies that said fires were the cause of the damage to this plaintiff, as alleged and set forth in the plaintiff's complaint filed herein."

NINE men constitute a jury in Mexico, and a majority gives the verdict. If the jury is unanimous there is no appeal.

LAWS are often mere notice-boards, set up in out of the way places where no one can read them. If you wish to keep people off a road, close it with a barrier that stops the most heedless man at the very entrance. It is better to make trespass impossible than forbid it.

—Joubert.

INTERESTING GLEANINGS.

AN American who has returned from a summer trip in Europe says he found it more difficult to be as polite as he wished in the city of Hamburg than in any other place in Europe. There the most chivalrous man has to think twice before giving up his seat in a car to a lady, as he may be turned off the car for his politeness. It seems that the Hamburg trolley cars will seat, according to size, twenty or twenty-eight persons, ten to fourteen on each side. In addition, four persons are allowed on the front and five persons on the back platform. When the car is full the conductor hangs out a sign, "Besetzt," which means "occupied," and is absolutely forbidden to take on another passenger until some one gets off the car. Sometimes, while the conductor is in front collecting fares a lady will step on the car, which is already "occupied." As there is no conductor on hand to prevent her, the lady steps inside, and the gentleman who may offer her a seat comes out and takes his stand on the platform. When the conductor, after going his rounds, returns to his post, he promptly requests the gentleman to step off the car, as he has forfeited his seat, and the car is fully "occupied." Should he refuse to leave the car he is put off. The policemen on the streets are instructed to watch the cars sharply, and if they find a car carries even one more passenger than its proper complement the conductor is fined seventy-two cents, which is paid to a charity fund of the street railway company.

STATISTICS have been published to show that brain workers are long-lived. Five hundred and thirty eminent men and women of the present century were taken, and their duration of life gives an average of sixty-eight years and eight months.

ONE of the most curious plants in the world is what is called the tooth brush plant of Jamaica. It is a species of creeper, and has nothing particularly striking about its appearance. By cutting pieces of it to a suitable length and fraying the ends, the natives convert it into a tooth brush; and a tooth powder to accompany the use of the brush is also prepared by pulverizing the dead stems.

No one who has not seen an African "kopje" can easily realize it. It is not a hill so much as the stump of a hill — what is left of it after ages of denudation; but the special feature of it is that it is almost invariably covered with a breastwork of boulders. Tropical torrents have washed away the earth and all the soluble components of the rock, and what is left consists of heaps and lines of detached

masses of sandstone, ironstone or granite. The "kopjes" are the Boers' fortifications, and they have any number of them.

SCOTLAND Yard widely known as the headquarters of the London police, is an historical place, said to have been the site of a palace where kings of Scotland were received when they came to London. It is located near the banqueting hall, Whitehall. The Scotch kings retained possession of it from 959 till the rebellion of William of Scotland. Milton, Sir Christopher Wren and other notables lived in Scotland Yard.

GERMAN surgeons made the discovery that the delicate membrane that lines the inside of an egg-shell will answer as well as bits of skin from a human being to start healing over by granulation in open wounds which will not otherwise heal. The discovery was used, for the first time in this country on a patient in the Seney Hospital in Brooklyn, and it proves to be a successful trial. The patient left the hospital and resumed his customary work, a well man. . . . Surgeons have long known that healing by granulation requires, in a weak patient, some point (or points) around which the granulations can cluster and grow. For this purpose they have had to rely upon bits of human skin, taken from some person who is willing, for love or money, to submit to the painful process of having these bits cut out. In this case, the patient's wife, his nephew, and a young man in his employ, all offered to furnish the required cuticle. But luckily one of the surgeons then remembered the German discovery, and getting some fresh eggs, tried the lining membrane of the shell. It proved a successful substitute.

THE slow flapping of a butterfly's wings, according to Sir John Lubbock, produces no sound, but when the movements are rapid a noise is produced, which increases in shrillness with the number of vibrations. Thus the house fly, which produces the sound F, vibrates its wings 21,120 times a minute, and the bee, which makes a sound of A, as many as 26,400 times. Professor Narcy, the naturalist, has succeeded by a delicate mechanism in confirming these numbers graphically. He fixed a fly so that the tip of the wing just touched a cylinder which was moved by clockwork.

LITERARY NOTES.

THE April ATLANTIC opens — very appropriately to the season — with An Acadian Easter, a series of striking lyrics by Francis Sherman, commemorative

of the fate of castle La Tour and its fair commander on Easter Sunday two hundred and fifty years ago. George F. Parker, United States Consul at Birmingham, England, gives an inside view by an experienced observer of the character and weaknesses of our Consular System; the status and duties of consuls; the vicious methods of appointment; the neglect of the service by congress and its unsatisfactory manage by the State Department. W. J. Stillman in his autobiography describes his art studies and his experiences at Paris (while waiting for a Hungarian call to arms which never came), followed by his artistic and camping life in the Adirondacks after his return to America. The Perplexities of a College President, by One of the Guild, is a valuable and startling exposition of the difficulties under which the heads of most of our collegiate institutions labor. The author points out that, contrary to all business practice, the president of a college is largely so in name only. His actions are continually trammelled or opposed by his faculty or his trustees, while his professors look upon advice or interference from him in their work as insulting to them. He demonstrates that education is a business and should be directed by business methods, and that the heads of such institutions should be so actually, and be given an authority commensurate with their responsibility.

IN the REVIEW OF REVIEWS for April, Professor J. W. Jenks, who has served the United States Industrial Commission as expert adviser in the trust investigation, sets forth the merits of publicity as a remedy for the evils of trusts, with special reference to the conclusions of the Industrial Commission, and to the pending legislation in New York known as the "Business Companies' Act." In an article entitled "The Constitution of the Territories," Prof. Harry Pratt Judson, of the University of Chicago, defines the powers of congress in relation to our new possessions, exposing some of the fallacies that have crept into the discussion of the subject, both within and without the halls of congress.

THE complete novel in the NEW LIPPINCOTT for April is entitled "The Heart of the Ancient Wood," by Charles G. D. Roberts. The few but large souled human characters in it live in the woods of the North, close to nature's heart, with the beasts of the forest for their friends. Yet even here the old, old story is very present; the wild surroundings cannot entirely efface the coquetry natural to woman and there is rivalry of a unique kind to bring this out.

This issue is replete with good fiction: A complete novel and four short stories. Seumas Mac-

Manus has one of his characteristic, humorous Irish stories called "A Celtic Beauty." "Their Last Trek" is by H. Anderson Bryden, an athletic Englishman who, having travelled extensively in South Africa, is thoroughly up in his subject, and in this story he presents a touching picture of Boer life. Robert Shackleton writes an amusing sketch of the old South, reflected in New York, in which the "Randolphs of Virginia" are conspicuous characters. "The Alpine Rose," Mrs. J. K. Hudson's fourth story in her series on Mormon life, receives its title from the little mountain flower which is sometimes found on the highest peaks in this country, as well as in Switzerland, and which in this instance proves the link that binds an unhappy Mormon wife to her old home across the sea.

THE INTERNATIONAL MONTHLY for April contains several articles of timely interest. Aside from the interesting paper by Prof. L. M. Keasbey of Bryn Mawr, on "The Institution of Society," a subject of greater interest than perhaps the title would suggest to some, there are four articles of value, viz.: A review by Prof. Cheyney of Philadelphia, on "Recent Writing on English History;" the story of French drama for the last half and more, of the nineteenth century, by Brander Matthews of New York; "Comments on the War in South Africa," by Capt. Zalinski, a well qualified critic, and who looks at affairs from the standpoint of an experienced American army officer; and the article by Hon. John R. Procter, on "The Neutralization of the Nicaragua Canal." The latter article is especially timely.

THE April CENTURY is rich in pictorial illustration, its special art features including a frontispiece engraved by Cole, a full-page plate of H. O. Tanner's painting, "The Annunciation;" Castaigne's Paris pictures and Du Mond's decorative treatment of "The Groves of Pan," a poem by Clarence Urmey. From the "Talks with Napoleon," in this number, it appears that the Emperor was so fully resolved to make his home in America, in the event of defeat at Waterloo, that he had bills drawn upon this country for whatever sums he chose to take. "Fashionable Paris" is brought vividly before the reader by Richard Whiteing's pen and Castaigne's pencil. M. Worth's explanation of how fashions were started, under the Second Empire, is one of the titbits of this paper. Lovers of travel and adventure will turn to Miss Scidmore's account of "The Greatest Wonder in the Chinese World," the bore of Hang-Chau, a tidal wave that sweeps up the Tsien-tang River thrice every year; to R. Talbot Kelley's "Out-of-the-Way

Places in Egypt," with illustrations by the author; and to the first instalment of Benjamin Wood's true tale of "The Hardships of a Reptiler" engaged in turtle hunting, for profit, on the Caribbean coast of Central America. The same class of readers will be drawn to "The Kentuckian," a timely study of a type, by John Gilmer Speed, a native of Kentucky, and in some respects a typical representative of the "blue grass" state.

AMONG the features of SCRIBNER'S MAGAZINE for April, the animal story by Ernest Seton-Thompson, illustrated by him, will attract the large audience which has been fascinated by "Wild Animals I have Known." In this story is given the life and adventures of a curious little animal of the southwest, known as the kangaroo rat.

Governor Roosevelt continues his monograph on "Oliver Cromwell," with an account of the Irish and Scotch Wars. The end of this campaign was the supreme military triumph of Cromwell, and the last time he had to lead an army in the field. The illustrations show a number of the battle fields as they appear to-day. Barrie's great serial, "Tommy and Grizel" deepens in interest. It reveals Tommy as one of the most complex characters in modern fiction.

WHAT SHALL WE READ?

An important contribution to the study of crime is Mr. August Drähms's new work entitled *The Criminal*.¹ As resident chaplain of the state prison in California, Mr. Drähms has been brought into personal contact with the criminal classes, and this book is the result of many years' study of the subject. "Criminals are neither accidents nor anomalies in the Universe," says Maudsley, "but come by law and testify to causality, and it is the business of science to find out what the causes are and by what laws they work." In an able and exhaustive manner, Mr. Drähms discusses the criminal himself, the causes of crime, and the means of reformation and prevention. We wish we had the space to set forth his ideas upon the last two points, but can only mention a few points which strike us as particularly worthy of consideration. Mr. Drähms believes that prisons should be set apart for first offenders, and others for habitual criminals. He would have no unnecessary hardship and brutality; no such senseless humiliations as striped clothing, poll-shaving or

¹ THE CRIMINAL. His personnel and environment. A scientific study by August Drähms, Resident Chaplain State Prison, San Quentin Prison, San Quentin, California. The Macmillan Co., New York, 1900. Cloth.

other abominations, which serve only to lower the self-respect of a prisoner. Life detention, he believes solves the problem for the instructive and habitual criminal but short sentences should be the rule for first offenders. Another admirable suggestion is, "It is not the *length* of sentence, but promptness and certainty of trial and strict enforcement of sentence after conviction, that are the best aids toward a wholesome respect for the law, and a guarantee against relapse . . . A prompt judiciary would do more to break the backbone of rampart crime than all other instrumentalities combined." Adverse circumstances and industrial depression are, according to the author, great inducements to crime, and the bettering of industrial conditions would ameliorate the tendency to crime. The book is one which will be read with interest and profit, and should be productive of much good.

*A Municipal Program*¹ represents the result of two years' unremitting and painstaking endeavor to present in accordance with the original resolution of the National Municipal League, "a working system consistent with American industrial and political conditions, and embodying the essential principles that must underlie successful municipal government in this country." The proposed constitutional amendments, and the proposed municipal corporations act constitute the municipal program which was unanimously adopted at the Columbus conference. These two documents, together with the leading papers presented at the Indianapolis and Columbus meetings, and a "Summary of the Program" prepared by Prof. L. S. Rowe, constitute the report of the committee. Other valuable papers bearing upon the subject are also added. The book will appeal to all interested in "good government."

In a series of letters, purporting to have been written by two United States Army officers, Mr. Stephen Bonsel in *The Golden Horseshoe*² tells the story of expansion. The book is a strong argument in favor of a greater confidence in the men who are engaged upon the problems of peace in the West Indies and the task of pacification in the East Indies which the irresistible course of events has forced upon us. The letters are exceedingly interesting and should arouse a feeling of confidence that our new problems will be resolved in a manner worthy of the American people.

¹A MUNICIPAL PROGRAM. Report of a committee of the National Municipal League, adopted by the League, November 17, 1899, together with explanatory and other papers. The Macmillan Co., New York, 1900. Cloth \$1.00.

²THE GOLDEN HORSESHOE. By Stephen Bonsel. The Macmillan Co., New York, 1900. Cloth \$1.50.

*The Prelude and the Play*³ is the title of a very interesting story just published by Houghton, Mifflin & Co. The plot is by no means novel. A man married to a woman, charming in every way, weakly yields to the blandishments of another woman and is discovered by his wife in what seems to her a compromising position. She therefore leaves him, sails for Europe and announces her intention to never return to him unless he comes to fetch her. Of course he comes. Everything is satisfactorily explained and all ends happily. The story is well told and holds the reader's interest throughout.

No one is more happy in reminiscence than Edward Everett Hale, and *A New England Boyhood*⁴ which is an autobiography covering his life up to date of his graduation from college, is written in such a fresh, vigorous, we might almost say youthful, style that it is hard to realize that the writer has long since passed his threescore years and ten. The boy of New England seventy years ago seems to have been much like the boy of to-day, and even if his surroundings were simpler and the rules of life more rigid than we are accustomed to, he nevertheless got a good deal of enjoyment out of existence. In addition to the story of his boyhood, Mr. Hale has added a number of papers upon topics of general interest. The book is thoroughly enjoyable and we commend it to our readers.

Mr. Lindsay Swift in his *Brook Farm*⁵ gives a delightful description of the most original community which was ever formed in this country. The individuals composing it have all been so prominently identified with American literature, that the story of this episode in their lives cannot but interest all readers. Mr. Swift not only deals with "Brook Farm" as an experiment, but gives a most entertaining account of the characteristics of those connected with it. The book is very readable and well worth owning.

In a *Danvis Pioneer*,⁶ Mr. Robinson tells the story of one of Ethan Allen's Green Mountain boys. The hero, a genuine yankee, after settling in the wilder-

³THE PRELUDE AND THE PLAY. By Rufus Mann. Houghton, Mifflin & Co., Boston and New York, 1900. Cloth, \$1.50.

⁴A NEW ENGLAND BOYHOOD and other bits of autobiography by Edward Everett Hale. Little, Brown & Co., Boston, 1900. Cloth, \$1.50.

⁵BROOK FARM. Its members, scholars and visitors. By Lindsay Smith. The Macmillan Co., New York, 1900. Cloth, \$1.25.

⁶A DANVIS PIONEER. By Rowland E. Robinson. Houghton, Mifflin & Co., Boston and New York, 1900. Cloth, \$1.25.

ness, meets Colonel Ethan Allen and later becomes a prominent actor in the stirring scenes which made Allen and his Green Mountain boys famous and never to be forgotten. Events in which the Vermont boys participated are graphically described, and the characters are all strongly and faithfully drawn. The book will interest both old and young.

*The Farmstead*¹ is the title of a new volume in the Rural Science Series, which has just been published by The Macmillan Company.

The author, I. P. Roberts, Director of the College of Agriculture, Cornell University, explains how the gains from farming may be applied to the making of comfortable and attractive homes. He does not hold out the hope that the farm is a theatre on which to accumulate wealth, but rather that it is a place upon which one may secure a competence and live a happy life. In the great majority of cases, the farmer fails to find happiness because he does not know how to live. Professor Roberts discusses the location of the house, the layout of the grounds, the details of construction of houses and farm buildings, the planning of the barns, the scheme of fields and fences, the furnishing and sanitation of the home. As far as any book can, this work will take the place of an architect for rural building—for Professor Roberts was himself once a builder. It is a book of advice for every one who lives on the farm, or who contemplates country life, and is profusely illustrated and printed in large type.

NEW BOOKS FOR LAWYERS.

THE ELEMENTS OF INTERNATIONAL LAW with an account of its origin, sources and historical development. By GEORGE B. DAVIS, Lieut.-Col. and Deputy Judge, Advocate Gen., U. S. A. A new and revised edition. Harper & Brothers, New York and London, 1900. Cloth.

The first edition of this work was very favorably received, and has been largely used by our American colleges and law schools as a standard treatise upon the subject of International Law. In this new edition the text has been generally revised, and the more important cases, to which the international experience of the last fifteen years has given rise, have been inserted. In its present form the work is admirable in every way, and will receive the hearty welcome to which its merits entitle it.

¹ **THE FARMSTEAD.** The making of the rural home, and the layout of the farm. By Isaac Phillips Roberts. The Macmillan Co., New York, 1900. Cloth, \$1.50.

AMERICAN BANKRUPTCY REPORTS, ANNOTATED, VOL. II. Reporting the Bankruptcy Decisions and Opinions in the United States of the Federal Courts and References in Bankruptcy. Edited by WM. MILLER COLLIER, MATTHEW BENDER, Albany, N. Y., 1900. Law sheep, \$5.00.

Mr. Collier is doing a good work for the busy lawyer in this series of Reports. His annotations are exhaustive, and the practitioner will save a vast amount of research and valuable time by consulting these volumes as they appear.

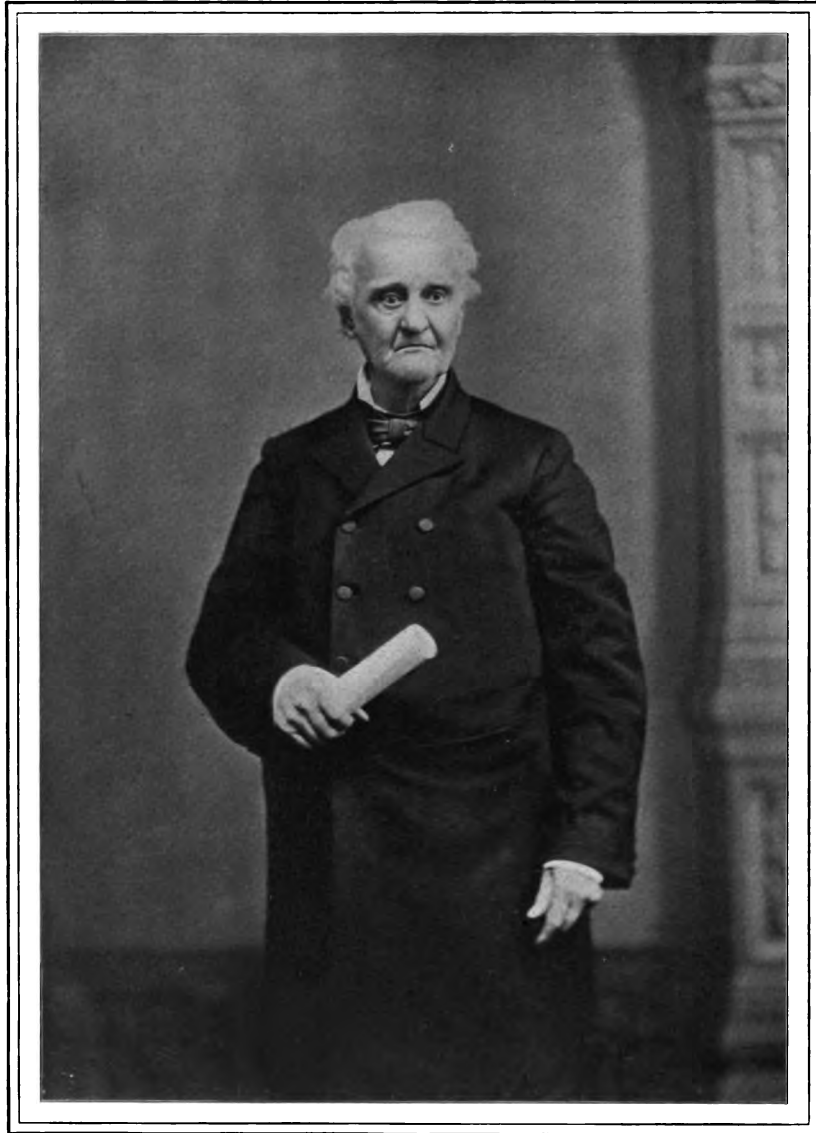
A TREATISE ON THE LAW OF WILLS including their execution, revocation, etc. By H. C. Underhill, LL. B., of the New York bar. T. H. Flood & Co., Chicago, 1900. Two vols. Law sheep. \$12.00, net.

In this treatise of Mr. Underhill's we have a really valuable addition to the existing literature upon the law of wills. The author has so arranged the treatment of his subject that everything which may properly be considered as exclusively a part of the law of wills, as, for example, testamentary capacity, undue influence, execution, revocation and the like, is contained in Vol. I., while those subjects which though frequently invoked in relation to wills, may be included under some other head of law, as, for example, equitable election and satisfaction, are comprised in the second volume. The work is brought thoroughly down to date, covering the latest English and American decisions, and is in every way admirably adapted to the needs of the practitioner.

NOTES ON THE UNITED STATES REPORTS, Vol. V. By Walter Malins Rose of the San Francisco bar. Bancroft-Whitney Co., San Francisco, 1900. Law sheep. \$6.50.

This volume covers the cases in 11-23 Howard, and is fully up to the high standard of its predecessors. Notes and citations are all that could be desired. We do not see how this series can fail to commend itself to the profession, for it is really one of the most important and valuable works ever offered to the legal fraternity.

AMERICAN STATE REPORTS, Vol. 70. Containing the cases of general value and authority decided in the courts of last resort of the several States and Territories. Selected, reported and annotated by A. C. FREEMAN. Bancroft-Whitney Co., San Francisco, 1900. Law sheep. \$4.00.



RICHARD W. THOMPSON.

The Green Bag.

VOL. XII. No. 6.

BOSTON.

JUNE, 1900.

COL. RICHARD W. THOMPSON.

BY CLAUDE G. BOWERS.

THE air of the Wabash valley seems congenial to the development of great men. Indiana has furnished her full share to the American galaxy of immortality, and the valley of the Wabash has more than performed her duty to the State. The men of the Wabash! Within that phrase is included hospitality, generosity, brilliancy, fellowship, enthusiasm, fire and fight and eloquence. Whether the broad and noble humanity of the region is due to the southern derivation or is inherent in the soil, the facts proclaim it a country where the sunshine of humanity warms its children into greatness. Ned Hannegan whose musical voice once charmed the high arena of national debate was a product of the valley and now sleeps upon her breast. Colonel Nelson, the gallant partisan who mixed generosity with conviction to form the picture of a lovable man, now mingles with her soil. Only the other day, the matchless Voorhees whose marvelous eloquence charmed his contemporaries and through his published speeches took hold upon posterity, went to enrich her mold. And now Richard W. Thompson, the last of an immortal company has become a memory whose fragrance sweetens every breeze that blows.

Over seventy years ago Colonel Thompson bade farewell to the Virginia hills and cast his lot with the struggling pioneers of Indiana. From that hour to this he has been an element in the State. Whether as statesman, lawyer, writer or man he has left an imprint in whatever capacity he has acted.

Years ago Thompson received that school-

ing in state craft which fixed the principles of his political career. His father's Virginia home was a seat of Southern hospitality. Here about the hearth was oftentimes gathered a group of aristocratic Federalists whose constant discussion converted the home into a miniature forum. While toleration protected every shade of belief, the creed in which his formative period was saturated was that of a strong centralization. He was in perfect harmony with the letter of our proclaimed principles. He clung to the constitution as though it were the Gibraltar of our nationality. Through all the years he carried and radiated a firm faith in the fundamental wisdom of the founders. A centralist by profession, he held that the constitution provided ample scope for a strong centralized government. Hence he ever antagonized the least deviation from that immortal instrument. He began his political life as a Whig of the most advanced type, enthusiastically devoted to the interest of Henry Clay. His relation to the sectional controversy which precipitated the Civil War was patterned after that of his idolized leader. He was an ardent advocate of compromise. Passionately devoted to the perpetuity of the Union, he had not outlived a love for the hills, the homesteads, and the splendid people of his native State. Virginia was to him the sepulchre of holy memories. It was upon its hills and meadows that his eyes first fell. Among its people he had spent his childhood hours and in its soil were buried the authors of his being. From this conflict of loves, he sought refuge in compromise. And not before the

flag of Sumpter had bowed before the breath of actual conflict did he cease in his efforts to avoid the catastrophe of Civil War. Misinformation declares Thompson the father of Hoosier Republicanism. Those who stood by the cradle of the party assert that he was the most dangerous foe of its formative period. Firmly convinced as to the political principles of the Republican party, he was unwilling to agitate the slavery question to the point of war. He clung to our constitution, then as ever, as the bulwark of our liberty, and the ultra-abolitionist who colored the early party with the suggestion of unconstitutional methods aroused all the opposition of his nature. As the head of the American organization in 1856, he bent all his energy toward dividing and crippling the party of Fremont in the State. He, perhaps, more than any other agency contributed to the defeat of Fremont in Indiana when victory in Indiana would have assured a national triumph. Nor did he cease his opposition to the Republican party with the election of Buchanan. In 1860, he antagonized the election of Lincoln with all the power in his command.

But Thompson was no laggard. He always kept abreast of his times. Upon the advent of inevitable strife, he threw himself heart and soul into the struggle for the maintenance of the union. And no one perhaps rendered more signal service than this exile from Virginia.

In Indiana Colonel Thompson has long been the Nestor of his party. He became synonymous with its fundamental principles. Forming a sort of mystic connection between the struggles of the past and the splendor of the present, he became the fount of inspiration to all who held his views. For years he crystalized the sentiment of his party in the composition of its platforms. The national Republican platform of 1868 was the fruit of his prolific pen. He presided over the last State convention he was ever able to attend in 1896. I distinctly recall the image of the

"old man eloquent" as he exerted his control over that turbulent assembly. He was at that time eighty-seven years old. In view of his advanced age, some doubting his ability to sound the keynote of the campaign, suggested the advisability of conferring upon him the honorary distinction and leaving to some more vigorous man the genuine duties. In fact the report was current that he was to merely thank the convention and turn the gavel over to Senator Beveridge. The convention was a scene of animation and excitement. A more enthusiastic and loquacious convention had not convened in years. Victory permeated the air and lent an uncontrollable determination to the friends of the different candidates. The stage was packed. The hot air was heavy with tobacco smoke, and the confusion of Babel was as silence when compared to the noise of the floor and galleries. Suddenly the brass band struck up "Hail the conquering Hero comes" just as the convention caught sight of the white head and beaming features of the aged orator it so loved to honor. A scene of wildest enthusiasm and the delegates fell back into their seats to listen.

At first a slight tremor was noticed in the chairman's voice but he soon warmed with characteristic fire, his sweet melodious voice penetrating with clarion clearness into every section of the hall. His gestures became more and more vigorous, the voice firmer and more flexible, and the well-rounded and perfect sentences all combined to make him young again. Entering into a discussion of the issues before the people, he touched all salient points with the energy of a campaigner in his prime. Logic, history and fervent eloquence aroused the partisan enthusiasm of his audience. But the most charming feature of it all was that the old man had not forgotten how to smile. Wit, broad humor and biting sarcasm interspersed with argument, mingled laughter with applause. The speech was worthy of the man.

The speech concluded, he continued at his

post. The smoke grew thicker, the excitement more intense, the duties more exacting, but the "old man eloquent" still clung to the gavel until younger men began to desert the hall for lunch when he relinquished his task.

From his earliest entrance upon public life he became a pre-eminent success. Sincerely devoted to those fundamental purposes that inspired his service, energetic in the discharge of his duties, and endowed with those personal attributes which command respect and devotion, he at once assumed a position of leadership. For half a century his voice was heard upon the stump and his influence felt in the councils of his party. That he was sincere in his devotion to his profession and his reluctance to accept office is clearly demonstrated by his public acts. As astute a politician as ever manipulated the party machinery of the State, he must have seen that the publication of his ecclesiastic works meant his certain ostracism from all elective offices. Always ready to serve his party, he was ever loth to share the official fruits of victory. Tradition says that he was literally forced to accept his first legislative nomination. His first intimation of congressional candidacy came with the official notification of his call to duty. He refused the most honorable posts that he might retain his legal practice. The position as Minister to Austria—now held by an eminent Indiana lawyer—was offered and refused. Lincoln with the most flattering persistency urged him to accept a life position in Washington, but to no avail. Untainted by a single defeat, armed with personal popularity, and irresistibly brilliant in the management of men, he might have had any office within the gift of his party. Had he been more desirous for power and place; had he loved position more and Indiana less; and had he been less faithful to his profession he might have been president of the United States. During the latter days of his life he became a hold-over delegate-at-large to the national conventions. His se-

lection became as much a matter of course as the convention itself.

His appointment to the cabinet of Hayes was the natural fruition of a life of unselfish service. As Secretary of the Navy he became the servant of the people. The contractors who had previously grown corpulent at the public crib realized that the department was run on honest business principles. He familiarized himself with every phase of his duties, purified the department with the air of publicity, and examining the crevices with marked thoroughness, mastered the situation. His bright eyes followed the movements of every penny of appropriation. He turned the search-light of strict integrity on the slightest allowance. His drafts upon the national treasury were never questioned. At the end of the first fiscal year, one and a half million dollars of appropriations were returned unexpended. Partisanship bowed before this luminous example of lofty patriotism—and after four years of conscientious service, he carried with him from the department the benediction of all American citizens.

Upon his voluntary retirement from Congress in 1843, he determined to devote his energy to the practice of his profession. To that end he removed from Bedford to Terre Haute, then as now the metropolis of western Indiana. Terre Haute numbered at that time no more than two thousand people who settled about the crude brick courthouse which dispensed justice from the center of a locust grove. In those days the lawyer was necessarily allied with the horse. From court to court he would travel on horseback, braving the most inclement weather with a laugh, and exchanging about the fireside of the inn those famous stories that have become the traditional literature of the west. Shortly after Thompson's arrival, the following card might have been seen in a Terre Haute paper:—

"R. W. Thompson, attorney and counsellor-at-law, attends all the higher courts of the State and the Circuit Courts of Vigo, Clay, Sullivan,

Putnam, Park and Vermillion counties. He will collect debts throughout the western part of Indiana and the eastern part of Illinois."

In the preparation of this article I find that very few living to-day have a distinct personal recollection of Colonel Thompson at the bar. In fact he had almost retired from active practice when lawyers, now old in the law, were mere students. General Coburn who as a boy scampered about the Supreme Court of years ago during the clerkship of his father recalls him thus: He was a brilliant looking young man, pale and delicate in appearance with regular, handsome oval features, erect in form, spry in movement, ready in speech, whether in conversation or at the bar. Affable, happy, polite, genial; his winning manner, his cordial greeting, his keen sense of propriety gave him an unusual advantage over his associates at the bar." Thompson was a great lawyer. Superficial in nothing, he was particularly fundamental in the law. His keen insight penetrated the transient devices and took hold of that portion which bears the immortality of justice. He was distinguished in the arrangement of evidence. He marshaled his evidence, as, on the field of battle a great general might marshal his soldiers to bring about the most complete result. He saw *through* dissimulation because his eyes were made for truth alone.

While he won considerable distinction in the criminal law by virtue of his superior advocacy, he was most celebrated as chief counsel in numerous cases demanding deep research, subtle knowledge, and involving immense sums of money. Years ago he successfully prosecuted the claims of the Swanee Indians against the government. The case, no doubt, which brought him the widest celebrity owing to its national bearing was that growing out of the Menomonee Indian claim. He was retained for a double purpose: to prevent their removal west of the Mississippi river in among the tribes that were ferociously antagonistic; and to secure

from the government additional money for land ceded to the government under a misunderstanding as to extent. The first portion of his client's case was arranged through the instrumentality of the Wisconsin legislature. The second portion involved more of acrimony and excitement. Simply stated, this demand for additional payment was based upon the following grounds: Under the treaty of 1848, the government had purchased from the Menomonee nation, land estimated at 3,000,000 acres. Upon being surveyed the discovery was made that owing to the crudeness of the government maps, the land had been under-estimated by 4,000,000 acres. Thompson's demand then was for an additional \$242,000 to cover the discrepancy. Successful in his suit, in as far as his clients were concerned, he encountered a dishonorable opposition from the Indian commissioner who attempted to prevent the settlement of his personal claim. According to the original agreement he was to receive as fee one third of the amount recovered. In contempt of this understanding the commissioner added to the bill a provision by which the Indians' consent would have to be obtained a second time. Voluntarily Thompson had previously cut the fee in two, making it \$40,000. During the course of the acrimonious debate which followed the introduction of the personal spite amendment, Thompson was the recipient of the most beautiful encomiums from political opponents. Eventually half the original claim was paid. In addition to the mercenary fee, his Indian clients bestowed on him an Indian name, made him an honorary chief, and presented him with a tomahawk as proof of their admiration and gratitude.

While civil law was Thompson's forte, his eloquence was often demanded in the defence of criminals. In 1856 he was called upon to defend Chas. Thompson, who in a jealous passion engendered by rivalry in a literary society, stabbed Oscar Lill to death. Not only did Thompson have to overcome the passion and prejudice of the people, he was

compelled to face Senator Voorhees, the most powerful criminal lawyer of the day. No higher eulogy could be passed upon his power than to record the verdict of the jury — "one year in prison." If there ever was a man whose brilliancy might place him alongside of Voorhees to divide the honors of Indiana advocacy that man was Major Jonathan W. Gordon. Thompson was pitted against this jury giant in the defence of Dr. Newlands who killed his daughter's betrayer. It is doubtful if Gordon ever exerted himself more earnestly than in the prosecution of this case. His speech to which Thompson responded, deserves a place side by side with Voorhees's masterpieces. Thompson here was in his element. Himself the very embodiment of domestic virtue, clinging to the old Virginia code of morals, he justified the killing of any man who dares assail the purity of innocence. His defence of Newland was successful and his action in that trial recurred to him with ever increasing pleasure throughout his succeeding days. Colonel Thompson was the first legal representative Terre Haute ever had acting in that capacity from 1846 to 1848. When in 1852, the Terre Haute and Indianapolis railroad of the Vandalia Line first pierced the Hoosier forest and bade the stage begone, he was made the first general counsel.

As an orator he ranked high but lacked that versatility of expression that characterizes the truly great tribune of popular favor. Unlike the Tom Corwin of General Coburn's description who "was an orchestra complete and not a single instrument," Thompson played but few instruments, but those were perfect. Argumentation, sustained and musically composed and delivered was his forte. He exhausted every subject that he touched. Rich in ideas he clothed them becomingly in an inexhaustible vocabulary. Not only did he speak longer than any Indiana orator, he spoke with a rapidity that was unexcelled. To quote General Coburn:

"For the first four or five hours he was a very entertaining speaker but after that he became somewhat prosy." He was not the orator of glittering phrases gleaned from the midnight oil. Precise in his diction he seldom paints lurid pictures with which to play upon the fancy. He contented himself with the elevating prose of musical proportions and pure diction which charms the pages of Addison and his school. He was as simple and strong in utterance as in action. The exquisite beauty of his discourse consisted more perhaps in the sweet-toned and well-modulated voice which once heard, reverberates forever in the memory. In his address at the unveiling of the Morton statue he essayed with brilliant success to analyse the oratorical style of fourteen celebrated orators within the space of five minutes. With that analytic faculty that distinguished his genius, together with the literary brilliancy that adorned his style, he struck off in elegant completeness images of the greatest orators in our history. His speeches always verged on literature.

He had aspirations toward literature. He breathed the atmosphere of books. His library was his temple. His pen has given four books to the world of letters, all bearing the stamp of literary power. His work on "The Papacy and the Civil Power" while manifestly inspired by an undue fear of the Pope's protruding his official sway into American political life, deserves to live in the literature of ecclesiastic controversy. Whatever may have been the spirit in which the subject was approached, the language in which it is treated is always calm, temperate, respectful and argumentative. To understand the scope of Thompson's mind, his breadth, depth, and versatility; to comprehend that natural greatness which makes him kindred to Gladstone, one must lay aside all prejudice and passion and read his books as well as the speeches that reflect his public career. Disbelieving as I do in the fear which

prompted the publication of this work, I read it with the most exquisite pleasure. The language is but little inferior to Milton's prose. It has the music of simplicity. To read his perfect flowing sentences, always concise and never jerky, is like watching a perfect drill of a richly uniformed battalion. His "History of the Tariff" is essentially partisan. Disclaiming any intent to attempt originality in argument, he merely selects from such works as are inaccessible to the general public those passages which tend to fortify the Republican cause. With admirable dexterity, he makes state papers, political letters, and partisan histories advocate the Republican conception of a patriotic tariff. Still in the final analysis this work must sink into the category of an extensive partisan pamphlet and be ultimately forgotten. But one work he has given to universal commendation—his "Personal Recollections" upon which his literary reputation must stand or fall. In two large volumes, he gives his reminiscence in a brilliant but breezy manner, that cannot help but delight while it instructs. An ardent Whig and Republican, he displays to a surprising extent those qualities of clearness, calmness and impartiality which essentially divides the historian from his fellows in literature.

Thompson was a perfect gentleman, genial, polished, polite, and easily approached—a realization of the typical southerner of chivalric memory. An aristocrat of mind and heart he was a democrat in manners. In social intercourse he was a poem of harmony. Throughout his life, this social instinct smoothed the pathway of his progress.

Despite his tremendous attacks upon Catholicism he never permitted his ecclesiastic any more than his political views to interfere with his personal friendships. One of the most intimate of his associates was Father Simon Lalumiere of whom in reminiscent mood he has spoken in the most affectionate manner. The friendship between Voorhees and Thomp-

son was as beautiful as it was unique. Beyond an honest intent and a broad humanity they had but little in common. Voorhees was an ardent Democrat; Thompson an advanced Republican. Voorhees' poetic nature revealed to him the splendor of Catholicism; Thompson's practical logic saw little beyond the infallibility of the Pope. Voorhees was as wayward and careless as genius; Thompson as strict and scrutinizing as talent. Voorhees flew into controversy on the wings of impulse; Thompson entered cautiously, taking counsel of reason. And yet these congenial souls read the hearts of one another and saw beneath the vest of worldly opposition, the beating of a warm and vigorous heart.

Colonel Thompson had the optimism of firm faith. The benevolence that glorified his aged countenance was but an anticipation of the eastern light. In his brilliant address on Morton he casts some light on his philosophy—a philosophy which saw in life more mystery than in death. For years he had been prepared to die. He spoke of it with the complacency and confidence with which one might announce a journey to Italy. Between America and that land of sacred beauty stretches a world of waters—yet the Pilot's skill but seldom fails. Between this life and that eternal Italy, the mystery is deeper than the sea—but the Pilot's hand has never failed. Never has there been a more luminous old age. Surrounded by the people he had served; worshipped by the future generation that hung upon his lips; conscious of the discharge of his duty and the stability of his place in history, he looked out over the land of prosperous development he had seen expand beneath the energy of man—and called life good. He never doubted the perpetuity of the Republic. He had almost stood by its cradle, had witnessed its early struggles for existence, and had seen it pass through the darkness of desperate conditions into the pure light of prosperous day. He smiled

in the face of Death and Death smiled back.

On the monument that shall soon keep alive for future generations the form and features of "the old man eloquent" may be well inscribed the poet's praise:—

Statesman, yet friend to truth, of soul sincere,
In action faithful and in honor clear,
Who sought no title, served no private end,
Who broke no promise, and who lost no friend.

THE PASSING OF THE SERJEANT.

BY GEORGE H. WESTLEY.

BORN in 1816; created a Serjeant-at-Law in 1862; died in 1900—such in brief is the mundane tale of Frederic Lowten Spinks, the last of a long and honorable line. Or to be more precise, the last of those called Serjeants-at-Law, for there still live several of the order who, however, having risen to higher honors are no longer known by that old and respected title. So that it may truly be said the Serjeant-at-Law has now joined the Dodo and other things in what has been called "the world's great museum of extincts."

The beginning of the order seems to be lost in the maze of mediæval history. Sir William Dugdale who wrote extensively on the Serjeants in his *Origines Juridiciales*, for some reason did not make deep research into their origin, and on this point I think we cannot do much better than to refer to the work by Sir Henry Chauncy on the Historical Antiquities of Hertfordshire. "This degree is very ancient," writes Sir Henry, "for I find Pleaders, Counteurs, and Attornies did manage Causes and Controversies in Law in Normandy before the Conquest, called in Latin *Servientes* and *Narratores*, because they served the King and people in pleading their matters in law for their Fees: and in French they were termed *Serjeant Counteurs*."

Sir Henry goes on to say that after the accession of William the Conqueror, great numbers of the inferior clergy who were skilled in the Norman laws "followed that King hither and were called by writ to this

Degree, for I find a Writ of the same form with a Serjeant's among the Writs in the most ancient Register in Manuscript. These Serjeants were of two sorts: 1. *Servientes Regis ad Legem*; 2. *Servientes ad Legem*." This seems to be as far back as any of the old writers can trace the order with any degree of certainty.

Sir John Fortescue enlightens us on the manner of man who in the early days was chosen for this honor. He tells us that the Lord Chief Justice used, as often as he thought desirable, to choose "seven or eight of the discretest persons that in the foresaid general study have most profited in the Laws, and which are thought to be of the best disposition . . . every one of the persons so elect to take upon him the state and degree of a Serjeant-at-Law."

And for a note on an ancient custom of theirs we look to Chaucer, who says in one of his Canterbury Tales

A serjeant of the law, wary and wise,
That often had y-been at the parvis.

"Parvis" meaning the porch of old St Pauls, where each Serjeant had his particular pillar at which he held interviews with the clients.

We come now I think to matter of more interest. Of old the creating of a Serjeant was attended with almost as much pomp and ceremony as the crowning of a King. Not to enter elaborately into the details of the occasion, one of the special features was the giving of gold rings. Each of the new elect had to give rings of gold, to the value of forty

pounds at least, to the high officials and other dignitaries before whom he came to receive his degree. To the Lord Chancellor and to each Prince, Duke, and Archbishop present, a ring to the value of twenty-six shillings and eight pence. To the Lord of the Privy Seal, and to each Earl and Bishop, a ring to the value of twenty shillings. To each Lord Baron of Parliament and each Abbot, Knight, and Justice, a ring valued at a mark; and so on down the list "insomuch that there shall not be a Clerk but he shall receive a Ring convenient for his degree."

It was the custom also for them to give liveries to their servants, and suits of clothes to the friends and acquaintances who did them the honor of being present.

But the *pièce de résistance* of the affair was a great feast that lasted seven days. I have put myself to no great search to discover the nature of the viands at these very early banquets; doubtless many of the dishes would be totally unknown to us; but glance, if you please, at the prandial sufficiency supplied on an occasion of the kind in the sixteenth century. There were brought from the slaughter house, says the historian, "twenty-four great beefes, one carcass of an oxe, one hundred fat muttons, fifty-one great veales, thirty-four porkes, and ninety-one piggs." Besides which there were 'three hundred and forty dozen larks, thirty-seven dozen pigeons, fourteen dozen swans, and a great supply of other good things.

Not only did they have an abundance of provender, but it was finely set up and well served. On the banquet board there was a great standing dish of wax, representing the Court of Common Pleas, and if I were to write down the full list of savory edibles, such as chewet pies, roasted godwits and knotts (whatever these were) baked venison and venison pasties, roasted pheasants and swans and woodcocks, jellies and custards, not to mention such things as spiced bread, comfits, and hippocras, space would fail and all of us grow ravenous in the reading.

The account of the food consumed on this occasion shows that much of it was sent in by the new Serjeant's friends. Thus we read: "Cates sent in by Mr. Walpole," under which heading is given a large supply of game, turkeys, and deer contributed by that gentleman—and again like gifts from Mr. Catline and Mr. Browne and Mr. Prideaux. The latter seems to have been a glutton, greedy also, and not over gracious in his giving, for we read above his list: "Cates sent in by Mr. Prideaux, *for himself alone*." Possibly he warmed up to generosity before he had finished his four does, his swan, his bustard, and his ten capons, but it is not mentioned that he allowed his fellow guests even so much as to pick a bone.

In due time the coming and the going, the kneeling and the curtseying, the writ-reading, oath-taking, speech-making, ring-giving, feasting, and congratulating were all over, and the new serjeants settled down to the enjoyment of their privileges. Upon them fell the expenses of the feast and the gifts, and it was no small sum that each of them had to draw from the recesses of his pocket; though it is not recorded that any one of the order ever grudged the cost, or at any rate down to 1846, before which year they had exclusive right to practice in the Court of Common Pleas, certainly a remunerative privilege. Sir John Fortescue writes on this point: "Neither is there any man of Law throughout the universal world, which by reason of his office or profession, gaineth so much as one of these Serjeants." Moreover it was for centuries a rule that the ranks of the Justices could only be recruited from the Serjeants-at-Law. Latterly, to be sure, this rule was sometimes quibbled with, for when it was desired to create a Justice from outside, the candidate was simply made a Serjeant the day before his higher appointment. In 1875 the rule thus played with was set aside altogether.

I must not omit to speak here of their garb and insignia. Sir Henry Chauncy, who was

himself a member of the brotherhood, says of the earliest Serjeants, that being clerks or religious men, bound by their order to shave their heads, they were allowed to cover their bald pates with a thin linen cap, hence they got the name "Serjeants of the Coif." These coives, he tells us, were soon after changed from linen to white silk, and every Serjeant was clothed in a long robe such as priests wore, with a lamb-skin cape about his shoulders, and a hood with two "labels" on it, "that the people should show the greater respect as well to their Persons as to their Professions."

It appears that in the course of time the white silk of the coif gave place to black, and also that this headgear shrunk from full size to a mere black patch on the top of the Serjeant's wig. This black patch came finally to be about the only distinguishing mark in dress between a Serjeant and other members of the bar. And, by the way, an amusing story is told in this connection. Serjeant Allen and Sir Henry Keating Q. C. were on one occasion opposed in a case at the Assize Court in Stafford. After the trial, in which they had given it to each other pretty hot, they were walking along arm in arm together towards their lodgings, when they overheard the following conversation between two men who had followed them from the court. "If you were in trouble Bill, which of those two tip-top 'uns would you have to defend you?" "Well, Jim," was the reply, "I should pitch upon that one," pointing to the Q. C.

"Then you'd be a fool," said the other, "the fellow with the sore head is worth six of him."

There were several grades of Serjeants-at-Law. There was the Kings Chief Serjeant, the first of these, Dugdale says, being created in 1321. Next below him were the two Ancient or eldest Serjeants; then the Serjeants with patents of precedence, and finally the ordinary Serjeants. The first two grades when left vacant many years ago, were not again filled.

The plain Serjeant, of late years, occupied an intermediate plane between Her Majesty's Counsel and the rest of the bar. The Serjeant with a patent of precedence stood equal with the Queen's Counsel, the only difference being their manner of creation, and the fact that while the Q. C. had only a professional rank, the Serjeant had a social rank as well.

Sometimes the legal title was confounded in the public mind with the military, as when Serjeant Ballantine, being counsel in a court-martial case, was invited to dine with the Welsh Fusiliers. When he presented himself and announced his name and title to the orderly, he was informed, with a scornful air, that it was an officers' mess. Ballantine explained that he was a Serjeant of quite another kind, and he was admitted.

The Serjeants' decline from their high estate — and it was high, for they once ranked next to knights and before companions — was due to the throwing open of the Court of Common Pleas to the whole bar indiscriminately in 1846. As one of the last of the order has put it "with this our *raison d'être* ceased;" and the Act of 1875, previously mentioned, was the finishing blow to an already moribund institution.

Of all the pomp and proceeding at the making of a Serjeant-at-Law in the olden time, the ring-giving seems to have been the only part to survive. Latterly there were no great feasts of roasted godwits and knotts and chewet pies; no comfits, no hippocras, but only a simple ceremony with very few witnesses. Serjeant Robinson one of the last of the line, describes the affair as follows:

"On the creation of a Serjeant a number of gold rings, about twenty-eight, had to be bestowed by him on several persons of different grades — the Queen, the Chancellor, the Judges, and the Master of Common Pleas. Even the chief usher of that Court received one, but it dwindled down to a hoop of not much greater breadth than a curtain ring, and about a tenth of its thickness. Her Majesty's ring was a very massive affair,

nearly an inch broad with enamel in the middle and massive gold ends; on the former was engraved — as was the case with all of them — a motto specially chosen for the occasion. The one I selected was *Ex Sese*, which my friends kindly suggested was intended for Ex C. C., as a memento that I had emanated from the criminal courts. The Chancellor's and the Judge's rings were about one third of an inch in breadth, but luckily for me, not very thick — as I had to pay for them. The greater number I never saw, for the goldsmith always undertook to distribute the gifts to those who by immemorial custom had claim to them.

"The ceremonial" continues Serjeant Robinson, "is very simple. You go in full official dress with your 'colt' (a young professional friend) before the Chancellor in his private room, where the Queen's Writ conferring the rank upon you is read. The oath of allegiance is then administered by the Chancellor, after which you kneel down before him and he pins the coif (a patch of black silk with a white crimped border) on the top of your wig and you become a Serjeant-at-Law."

For the rest, we learn that the "colt" then stepped forward and presented the rings, the Chancellor congratulated the new Serjeant, and the affair was over.

Doubtless the best known bearer of the title is Charles Dickens' famous character Serjeant Buzfuz, indefatigable pleader for Mrs. Bardell in the famous case of *Bardell v. Pickwick*. And by the way some one has pointed out that the Serjeant, clever as he was, was not so clever as he might have been in translating Mr. Pickwick's note: "Chops and tomato sauce" into a love missive. He might, as this critic says, have scored a distinct point by calling attention to the fact that another name for the tomato is the love-apple.

But there have been real Serjeants hardly less interesting than Buzfuz, if not so famous. One was Serjeant Arabin, a shrewd quaint little man whose odd saying and comical blunders were once put into a book under the title of "*Arabiniana*." A sample is given in his remark to a garrulous witness: "My good man, don't go on gabbling so. Hold your tongue and answer the question that is put to you." And another, after he became a judge: "Prisoner at the Bar, if ever there was a clearer case than this of a man robbing his master, this case is that case."

One might relate anecdotes of Serjeant Cockle also, who was called "the Almighty of the north;" and of Serjeant Davy who did and said many amusing things — but enough.

THE CALENDAR OF SCOTTISH CRIME.

I.

DISCUSSIONS on Sir Walter Scott's rank in literature generally hinge only on his poetry and romances. His work as a historian has been eclipsed by the brilliancy and profusion of his novels. But the aid he lent to the right understanding of history, especially to the domestic history of his own country, must not be measured merely by what came from his own pen. He was the guiding spirit of more than one literary and

historical society — his favorite Bannatyne Club, to wit — through the publications of which every ordinary reader has the means of attaining a general, or, if he chooses, a minute impression of the social state of the country and the habits of different classes during the progress from the middle ages to modern times. The true spirit of history can never be drawn from professed chronicles, which in early times were nearly always

composed by clerics, strongly biased and often irredeemably contradictory. Materials for a true picture must be gleaned, here a little and there a little, from official records and correspondence, family muniments and private letters. Perhaps Scott never performed a more lasting service to the cause of Scottish history than he did in prevailing on Mr. Robert Pitcairn, Writer to the Signet, to undertake the systematic examination and editing of the earliest recorded criminal proceedings in Scotland. It was a prodigiously arduous enterprise,—one from which Scott himself, though he contemplated it at one time, had been obliged to turn aside. In the fifteenth century the beautiful and precise caligraphy of an earlier age had given place to a more rapid, and infinitely less legible, current penmanship. Should any one desire to emulate it, he may arrive at a very fair imitation thereof by writing with a stylograph pen while he is driven rapidly in a wagonette over a bad road. *Experto credite.* It is full, moreover, of the most distracting contractions; and when it is considered that much of the huge mass of material which Pitcairn undertook to render into print consisted of notes rapidly jotted during the proceedings of a court (sometimes the evidence screeched forth by witnesses under dreadful tortures), some idea may be had of the nature of the task to which he applied himself. These labors were given gratuitously; for although the Maitland and Bannatyne Clubs, and a number of private individuals, subscribed towards the expenses of printing and publication, he is obliged to confess in his preface that he is confronted by "the extreme probability of suffering considerable pecuniary loss," besides the sacrifice of his professional duties during upwards of four years.

Such is too often the meed of those who bring the most useful contributions to the storehouse of knowledge. Posthumous gratitude is a cheap commodity, yet it is all that we have in our power to offer in return

for these four volumes in quarto, wherein are reflected the very acts and words of our forefathers, without the interference and glosses of some officious partisan. They are enriched, however, by the insertion of numerous original documents, collected from a great diversity of sources, supplementing the narrative where the Justiciary records are broken or defective. Besides these, the diligent compiler supplies a running commentary, which is far from being the least readable part of the volumes; and one is often amused by the half-apologetic tone of the sober Edinburgh lawyer, who seems appalled at the effect upon "every well-regulated mind" (a favorite phrase of his) of the horrors through which he conducts his readers.

Thus these selections from the criminal records are far more than a mere calendar of crime—than which nothing can be more dreary. They are revelations of family life in town and country—peeping-holes into the secret councils of statesmen and prelates—a diary of the difficult advance of a community from darkness to light.

The earliest volumes of the Criminal Records of Scotland having been lost, it is impossible to trace to their commencement those abuses which, it is too obvious, had become common in the judiciary system before the reign of James IV., to which the earliest surviving volume pertains. That monarch, in spite of a somewhat shaky private morality, showed a laudable activity in his desire for the right administration of justice, and was diligent to fulfil to the letter an Act passed by his first Parliament, "anent the furthputting of justice, throw all the Realme, that our Soverane Lord sal ride in proper persoune about to all his aieris [assizes]." It is well known to what interesting entries in the Treasurer's accounts these journeys, as well as the king's numerous pilgrimages, gave occasion. What price might not be brought at auction now for the "sang bwke" (song book) which "Wilyeam Sangster of Lithgow" sold to James for ten

pounds Scots? It was a cheaper bargain than the fee of 18s. paid "til a man that come to Lythgow to lat the King blud and did it nocht;" cheaper even than the 5s. paid "til a fallow brocht the King ii wolvis at Lythgow." But it is a rash thing to begin quoting from the accounts of James IV. (though Pitcairn sets the example in his delightful notes and appendices), because it is so difficult to leave off. This chivalrous monarch was so versatile in his pursuits, as liberal in offerings at a saint's shrine as in gifts to a mistress, as ready to lose large sums "playing at the cartis with Lord Dakir" (with whom he was so soon to be at deadly war), as he was to pay small ones to patients who volunteered to let him practice the amateur leechcraft of which he was so fond.

"Feb. 9, 1512. — *Item*, to ane fallow, because ye King pullet furtht his twtht . . . xiijs.

Feb. 25. — *Item*, to Kynnard, ye barbour, for tua teith drawin furtht of his hed be ye King. . . . xiijs."

Or, again, to assistants in field sports, as —

"Nov. 15. — *Item*, to ane man passit in ane loch, and rasit dukis [wild ducks] to ye halkis [hawks] be ye Kingis command . . . iis. iiijd."

The books of adjournal and minutes during this reign are very fragmentary. They have the disadvantage, moreover, of being written in abominable forensic Latin, though here and there occur passages of refreshingly vigorous vernacular. But it is easy to trace in the proceedings that vicious system of taking surety for prisoners, which is one of the least reassuring features of fifteenth and sixteenth century justice in Scotland. In theory it was well enough, corresponding to the modern practice of accepting bail, avoiding possible injustice in detaining innocent persons, and the inconvenience of maintaining a vast number of prisoners until the next assize. But inasmuch as it applied to per-

sons charged with the most heinous as well as with trivial offences, it acted enormously in favor of the wealthy and powerful, and of their protégés, and with cruel prejudice to poor men who had no influential friends. Take a case at random from the reign of James IV.

Peter Hall, in Newbigging, was charged at Jedburgh assizes with stealing a sword and hide target from John and Edmund Hall of the same place; *item*, for art and part of the slaughter of John Henrisoune in Lintoulee; *item*, stealing six ewes from Thomas Henrisoune in Jed Forest; *item*, for the slaughter of the said Thomas; *item*, for common theft. Here was a case surely, deserving condign punishment. Not according to fifteenth-century lights. David Ainslie was accepted as surety "to satisfy the parties," and Peter was free to set out on a fresh career.

This mode of defeating justice became more frequent as time went on. An example of the advantage easily derived therefrom by a wealthy baron occurs in the trial of Gilbert, second Earl of Cassilis, who is not to be confounded with his grandson Gilbert, fourth earl, the notorious "King of Carrick," of whom the anonymous author of the "Historie of the Kennedyis" (supposed to be the infamous John Mure of Auchindrane) observes that he "was ane particuler manne, and ane werry greidy manne, and cairitt nocht how he gatt land, sa that he culd cum be the samin." This second Earl of Cassilis, then, together with nearly every leading man in the numerous clan Kennedy and their allies, was arraigned before the Earl of Argyle, as Justiciar General, and a jury of fifteen gentlemen, in 1525, charged with the slaughter of Martin Kennedy, laird of Lochland.

Now, having in view the result of this trial it is not pleasant to remember that Cassilis was brother-in-law to Argyle, having married his sister Isabel. Cassilis and four others were put upon their trial first. It would have been a bold jury that had dared to convict the chief of this terrible clan.

'Twixt Wigtoun and the towne of Aire,
And laigh down by the Cruves o' Cree,
Ye shall not get a lodging there,
Except ye ride wi' Kennedy.

Cassilis was acquitted, and forthwith was accepted as surety for the rest of the accused, whose names fill a very lengthy catalogue. Had the earl been called upon to pay the full sum pledged by him for each of his followers, even his great wealth might have proved inadequate to liquidate his liability. But he was too formidable a subject to be driven into a corner. King James V. permitted him to compound on easy terms, and there remains extant his Majesty's letter to the Justice Clerk, advising him that his "weil belouit cousing and counsalour, Gilbert, Erle of Cassilis, had settled with him for the non-entry of his brother and followers "to have vndyrylin our lawis for Slaughtiris and crimis quhairof thai wer delatit," and directing that the "unlaws" be discharged.

Cassilis did not survive his pardon long. He was slain in 1527 at the Pow of Prestwick by Sir Hugh Campbell of Loudon, Sheriff of Ayr, in some affray of which the particulars have not been preserved.

This important dignitary, Campbell, had himself received respite only a few months before (July 1, 1526), to last for nineteen years, for all his "tresonis, slauchteris, etc., in ony tyme bigane," and does not seem to have found much difficulty in purchasing immunity for this fresh crime, for on July 1, 1528, a new remission is granted to him for the slaughter of Gilbert, Earl of Cassilis.

The fact is that the Monarch's purse and the public revenue (which were one and indivisible) were dependent for a great part of their supply on these "compoundings" by wealthy misdemeanants. The resources of the country had been drained to the utmost by two centuries of almost incessant war with England; the coinage had been debased till the pound Scots was worth little more than a shilling English or sterling; it would almost seem as if national bankruptcy would have

been the first result had all the barons and country gentlemen suddenly become virtuous and law-abiding.

Campbell of Loudon was not the only sheriff who derived advantage from his high office in dealing with his neighbors and evading justice. A scandalous instance of this is afforded by the proceedings before Lord Gray, Justiciary General, on November 4, 1509. Patrick Agnew, Sheriff of Wigtown, was convicted of having, under color of justice, submitted Thomas Portor to the judgment of an assize for the slaughter of John M'Myane, and then, as judge in the trial, to have taken "feyis" — bribes — to acquit him. Agnew was sentenced to a fine of five merks (about 10s. sterling)! In horrible contrast to this mockery appears the doom of Patrick M'Clellan, laird of Gelstoun, who on the very same day was convicted by the same court of stealing a score of oxen from Sheriff Agnew, *and was be-headed*. On the other hand, when, four years later, the sheriff was convict of cattle-lifting from Thomas Cuninghame, in Carrick, he was allowed to compound; convicted again, on the same day, of oppressing certain lieges during five consecutive years and plundering them of horses, swine, and barley, he was allowed to find surety "to satisfy the parties;" convicted a third time, on the same day, of attacking Sir David Kennedy with a party armed with "jakkis and splentis," and hindering him from holding his court, he was fined 10 merks (about £1). Dugall and Patrick Macclenochan, convicted on the same day of stealing *one* cow and a few miscellaneous articles which would not have been worth the Sheriff's while to annex, did not get off so cheap. They were hanged.

Again, before the same court and on the same day, notwithstanding that this invincible sheriff had been three times convicted of theft and violence, when a relative of his own, Nevin Agnew, was convicted of similar crimes — horse-stealing, cattle-lifting, assault, and "common oppression of the lieges" — the

Justiciar did not hesitate to let him go, accepting Sheriff Agnew as surety "to satisfy the parties."

Pretty satisfaction they would get! All this took place in Wigtown, within the jurisdiction of the sheriff himself. What possible hope of security could be entertained by those who desired to be law-abiding and honest? What possible respect could they have for the dignitaries representing the Crown?

But the misdeeds of the Sheriff of Wigtown pale before those of John Gordon, Sheriff Depute of Aberdeen, more than a century later. Frances Hay was alleged to have slain the brother of the Sheriff Depute's kinsman, Gordon of Geicht, to oblige whom the said Sheriff Depute, in 1616, seized and imprisoned the said Frances, put him on a mock trial, condemned him to death, and handed him over to the said Gordon of Geicht for execution. This gentleman shut Frances up in his own "privat prissone," and next morning had him led forth "to ane hole betwix tua mottis, quhair thay crowned thair tragidie," as the official "dittay" expresses it, "with so boutcherlie mangling and demaning [treating] the pino gentill-man, be geiving him sex seneral straikis upone his schoulderis, heid, and nek, as the lyk hes nevir or seldome bene hard and sene." Geicht, the Sheriff-Depute, and their accomplices were put on their trial for this inhuman murder, but they got off on Gordon of Rothiemay standing surety for them.

And so the sickening chronicle proceeds. It seems to have been possible for any man, no matter what his degree or the atrocity of his guilt, to secure immunity from all punishment except a fine, provided he could produce friends to go bail for him. If the bail were forfeited, so much the better for the Exchequer. Thus, to go back to the reign of James IV., at an assize held at Selkirk in March, 1495, William Clerk, arraigned for the slaughter of Robert Hay, Gilbert Cokburne, Thomas Lovel, and Gilbert Kermichel, produced a remission, David Pringle of Tor-

woodlee offering himself as surety *to satisfy the parties!* But it went ill with law-breakers who were neither influential nor useful enough to command the good offices of friends; and the record shows many entries similar to that of Robert Haw in Hevesyde, who was convicted at Jedburgh in 1510 of art and part in stealing horses, cattle and sheep, and a quantity of miscellaneous property, including a bagpipe, from a number of persons, and, being unable to find surety, was condemned to be warded by the sheriff for forty days, at the end of which time, if no security were forthcoming, he was to be hanged. At the same assize a similar sentence was pronounced on John Dalgleish, who had brought in Black John Routledge and his gang from over the Border to burn Branxholm, and the Armstrongs from the Debatable Lands to burn Ancrum. Had it been worth the expense to any baron to buy off these fellows, no doubt they would have saved their lives and liberty.

Sometimes, however, for causes not mentioned in the record, a mysterious leniency was exhibited to prisoners of humble rank, leaving the disagreeable inference that they were only the instruments of powerful persons whose names were not allowed to appear. Of such nature is the remission awarded in 1539 to Thomas Sinclair and his wife, Elizabeth Nesbitt, who seem to have committed an atrocious deed in the *multilatio et demembratio Roberti Hendirsonne de suis testiculis*.

But however repugnant to the spirit of justice may be the influence of wealth and station in protecting criminals against punishment, the evil sinks into insignificance beside the corrupt conviction of innocent persons at the instance of those in high places.

No more odious example of this has been brought to light than the infamous persecution of Janet Douglas, Lady Glamis, by direction of James V. the "Red Tod;" and the credit of having rescued this lady's mem-

ory from undeserved obloquy is due to Mr. Robert Pitcairn.

Lady Glamis was the daughter of the Master of Angus, and granddaughter of the famous earl "Bell-the-Cat." Archibald Douglas, sixth Earl of Angus, was brother-german to Lady Glamis, and, it will be remembered, had married Margaret of England, Queen-Dowager of Scotland, within eleven months of the death of her husband, James IV., at Flodden. Nevertheless, as soon as James V. had escaped from the custody of Angus in 1528, he swore in his wrath against the Douglasses that not one of that house should find refuge in Scotland while he lived. Parliament met on September 4 of the same year, and decreed the forfeiture of Angus, his uncle, and his brother. Lady Glamis, a true Douglas, regardless of her own safety, afforded help and shelter to her outlawed relatives, and, four years later, her lands and goods were forfeited on account of her intercommuning with them—"our souerane lordis Rebellis."

This was not enough. Her husband, Lord Glamis, had died in December, 1527, and she had married subsequently Archibald Campbell of Skipnish, second son of the Earl of Argyle. An assize was summoned in 1531 to try her on a charge of having destroyed her first husband *per intoxicationem*—that is, by deadly drugs and enchanted potions. But the trial never took place, owing to the difficulty of finding any gentlemen willing to serve on the assize of such a beautiful and deservedly respected lady. The lairds of Ardoch, Braco, Fingask, Abernethy, Pitferran, Lawers, Carnock, Moncreiff, Anstruther, Lord Ruthven, Lord Oliphant, and many others, were fined for absenting themselves from the jury. Therefore this preposterous charge failed,—for lack, it may be assumed, of a vestige of foundation.

But Lady Glamis's great beauty, her youth and illustrious descent, availed her nothing: she had committed the unpardonable offence of being born a Douglas, and

the King was implacable. A new charge was trumped up against her, upon which, six years later, in 1537, she was tried before Justiciar General Argyle and an assize of fifteen jurors, comprising the Earls of Atholl, Buchan, and Cassilis, the Lords Maxwell and Sempill, Home of Cowdenknowes, Maclellan of Bombie, and other persons of good standing. We have seen above how Chief Justice Argyle dealt with his brother-in-law Cassilis: he did not prove so lenient a judge when his sister-in-law, Lady Glamis, was arraigned before him. According to one historian, the origin of this new prosecution was as follows: Lady Glamis had been exposed for some years to the amorous importunity of William Lyon, a relative of her first husband. This creature, exasperated by her resolute rejection of his addresses, at length resolved on vengeance, and secretly denounced her to the Government as having plotted with one John Lyon, an aged priest, to poison the King. The informer, it is said, afterwards confessed his guilt, fled from Scotland, and died in great misery in Flanders. But whether this traitorous lover ever really existed, or was invented to screen the dastardly rancor of a more illustrious individual, it is certain that on July 17, 1537, Lady Glamis was arraigned on the double charge of conspiring and "imagining" (a fine elastic phrase) the death of the King by poison, and of treasonable intercourse with her brother, the outlawed Earl of Angus. Witnesses, undoubtedly suborned, gave such evidence as, if it were accepted at all, could not but lead to a conviction. Lady Glamis made a spirited defence at the bar, which so moved the assize that they sent two of their number to the King to represent to him that, although the charges had been proved on the oaths of witnesses, and according to the law of evidence the prisoner deserved death, yet they craved for a respite, to afford time to inquire into the character of the said witnesses, whether they were honest men or bribed knaves. The King declined to interfere, returning

answer that he had committed the administration of justice to the assize, and called on them to proceed in their duty. Of course this was a preposterous evasion, seeing how very often the Crown intervened to command that a case should be "continewit" to some future day. Accordingly, the jury recorded a verdict of guilty, acting, let it be hoped, according to their lights, though the sentence that followed seems as revolting an injustice as ever was perpetrated. Janet, Lady Glamis, was pronounced forfeited in life, lands, and goods, and it was decreed that "scho sall be had to Castell hill of Edinburghe, and thair brynt in ane fyre to the deid [burnt to death in a fire] as ane Traytour."

That this inhuman doom was literally fulfilled is testified in the record by the laconic comment — *combusta*.

Sir Thomas Clifford, reporting the circumstance to his master, Henry VIII., added the remark that Lady Glamis had been condemned, "as I can perceyve, without any substanciall ground or proyf of mattir." No doubt the entire public of Edinburgh and Forfarshire "perceyved" the same thing. The marvel is, how any social fabric could survive and recover from a system of administration compared with which the policy of any Oriental despot seems frank and tolerable.

Then, as if anything was wanted to complete the horror of the story, Campbell of Skipness, husband of Lady Glamis, who was a prisoner in Edinburgh Castle, must needs try and escape. "Thinking to brek waird and come away be ane tow [by a rope], the same was schort: he fell and brak all his banes, and died." (Anderson's MS. History of Scotland.)

In the same letter to King Henry, Clifford was in a position to report another act in the Douglas tragedy. John, Master of Forbes, had married a sister of Lady Glamis and the Earl of Angus, and thus allied himself with the Douglas brood. A charge was fabricated against him of "committing art

and part of the tressonable conspiratioun and abhomynabill ymaginatioun of the Slauchter and distructioun of oure soverane lordis maist nobill persone be schott of culwering (culverin)," and of conspiring with the English. He was convicted, and beheaded on the Castle Hill four days before Lady Glamis suffered. These bloody proceedings sufficed not to slake the Red Tod's thirst for vengeance. The young Lord Glamis, a boy of tender years, was arraigned eight days after his mother's death on a charge of having concealed his knowledge of her intention to poison the King. Incredible as it may seem, the Justiciar General and an assize of fifteen nobles and gentlemen convicted him, and sentenced him to be hanged "and demanyt [treated] as ane traytour." The sentence was not carried into effect, but the lad was kept a close prisoner, together with his brother, George Lyon,¹ during the remainder of this wretched Monarch's life. If anything were wanting to reveal the secret motive in this persecution of the Douglasses, it is supplied by the fact that the priest, John Lyon, apprehended as Lady Glamis's accomplice, was allowed to go free. He had no taint of Douglas blood in his veins. King James died in 1542, broken-hearted, it is said, by the disgraceful rout at Solway Moss, and young Lord Glamis was set at liberty, his forfeiture was rescinded by Parliament, 15th March, 1543, and the Act of restoration exposes the whole atrocity of the proceedings against himself and his mother. It recites how the boy, having been imprisoned in Edinburgh Castle, "destitute of all consale of his frendis," was forced to witness the torture of certain prisoners on the rack, and threatened with like torments if he refused to confess what was dictated to him. That, further, the Lord Justice Clerk, and other "familiaris" of the late King, assured him that his life and property would be safe, pro-

¹ George Lyon was not tried, nor is his name mentioned in any Peerage, but he was in ward with his elder brother on January 18, 1543.

vided he made this false confession, although they were acting contrary to law in dealing with a minor in the absence of his curators. Only one shred of palliation can be found for the conduct of James V. in these proceedings, and it consists in the ignoble excuse that his timid nature had been so wrought on by the enemies of the house of Douglas that he really believed his life was in jeopardy so long as one of them remained alive. Also, there can be no doubt that his mind had been imbued by the detestable principles of Machiavelli, by which it was taught, to use the words of the Duke of Alva to Philip II., "that the negociations of kings depend upon different principles from those of us private gentlemen who walk the world." Seven years before, King James had not blushed to put these principles in practice in order to entrap Johnnie Armstrong of Gilnockie.

Now the case of Lady Glamis and her son has been dwelt on at somewhat disproportionate length, not only on account of its heinousness, but because, until Pitcairn cleared it up, one historian after another had repeated the fable that Lady Glamis was punished for witchcraft; but that crime was never alleged against her. The idea must have arisen out of the earlier charge, which was abandoned, of administering enchanted potions to her first husband, conjunctly with the sentence that she should be burnt at the stake.

By the old law of Scotland burning was the statutory method of putting to death all women convicted of treason, witchcraft, or murder, just as those convicted of theft and minor offences were drowned, which was considered more merciful than hanging.

Yet one cannot overlook one hideous trace of the King's hatred of the Douglas in the execution of Lady Glamis. It was very unusual that the victim should be burned "quick"—*i.e.* alive. The ordinary form of "doom" was that the culprit "be tane to the Castell hill of Edinburgh [or elsewhere],

and thair to be wirreit [strangled] at ane stake to the deid [to death]; and hir body *thairefter* to be brunt in asches; and all hir moveabill guidis to be escheit," &c. But Lady Glamis was burnt alive.

A strangely dramatic piece of retribution fell on one of the jurors on the trial of Lady Glamis. Sir John Melville of Raith, a gentleman of high repute, having been one of those who returned the fatal verdict, not only on Lady Glamis, but also on her son and Lord Forbes, became himself the victim of a judicial murder.

To follow this case brings the reader down to that time when a novel form of offence had made its appearance in the records of the High Court. The first recorded instance of a melancholy series of prosecutions for entertaining views favorable to doctrines of the Reformed religion, and especially of "haifing and vsing of sic bukes as ar suspect of heresy and ar defendit be the Kirk"—*i.e.*, the translated Scriptures—occurs in 1539. But a prelatical Parliament had not succeeded in crushing entirely the spirit of the Scottish people. Prosecution for religious opinion brought the Government into direct conflict with the love of freedom innate in the masses, and the entries in the records of such proceedings during the reign of Queen Mary are far fewer than might have been expected, considering what is known of the events which heralded the Scottish Reformation. Pitcairn suggests that some of the entries may have been purposely expunged by the authorities as forming awkward precedents for those who, in later years, were charged with administering justice upon persons for professing the very opinions which former Governments had upheld and attending services in the "auld and abhominabell Papish manner."

Be that as it may, there can be little doubt that many of the prosecutions directed by the Regent Arran and his brother, the Archbishop of St. Andrews, against certain of the barons and gentry, were really aimed at them

because of their inclination to the Reformed doctrines; although, in order to avoid stirring popular sympathy, they were charged with imaginary crimes against the State.

Now, among those who were suspected or known to favor the Reformation of the Church was Sir John Melville of Raith, against whom it was not easy to make out a decently probable indictment; but the devilish ingenuity of the statecraft of those days was equal to almost any emergency. One of Sir John's sons was in England, whither he had either fled for security, as many Scots Reformers did in the early years of the movement, or had been taken as a prisoner of war. About the year 1547 Sir John wrote a letter in favor of this son to a certain friend he had in England, which letter, being intercepted and laid before the Government, was made the ground of a charge of high treason against the writer, although the substance of the writing was perfectly harmless, and had no reference to politics or religion. Melville was found guilty and hurried to the scaffold. The parallel between his case and that of Lady Glamis was rendered more complete by the terms of a gift of restitution made by Queen Mary in favor of his son fourteen years later. Just as the iniquity of the proceedings in the Glamis case was admitted in the Act restoring the young Lord Glamis after the death of James V., so in this instance the Queen gave back to young John Melville all the possessions forfeited from his father "ffor certaine *allegit* crymes of treasoune, *allegit* committit be him." In this tardy act of reparation, which took place in 1562, may be traced the hand of the great Earl of Murray, Queen Mary's chief and best adviser on her coming to Scotland in 1561.

The prelate upon whom public opinion fixed the odium of the judicial murder of Sir John Melville — "the most reverend father in Christ, John, Archbishop of St. Andrews," brother of Regent Arran — offered in his own person a forcible argument for the reform of the Church. The proceedings in

the trial of the third Lord Sempill for the murder, in 1550, of Lord Crichton of Sanquhar, within the Archbishop's own house in Edinburgh, afford a startling insight into the nature of that establishment. Sempill's daughter lived there as mistress of the Archbishop, a lady — if the statement in Johnston's manuscript may be accepted — "nather beutifull, of gude fame, or wtherwayis in any sort notable;" nevertheless her influence sufficed to put in motion the powerful intercession of the Archbishop, and her father received his pardon, on the usual terms of finding surety.

The example of the Primate of Scotland was not thrown away upon his clergy. "Benefit of clergy" — the monstrous privilege of immunity from lay jurisdiction for civil offences — had been greatly modified by this time; indeed it had become obsolete in regard to the more heinous offences. Hence there are numerous instances of the appearance of clerics as "panels" in criminal cases. One of these entries, made in the same year as Lord Sanquhar's murder, may be translated at length from the Justiciary Record as an extreme instance of the depths to which the sacred order had fallen: —

"Nov. 5, 1550. — Mr. John Ephinstonne, Rector of Innernochty, dilated of art and part of the cruel slaughter and murder of Thomas Cult in Auld Aberdeen, under silence of night: And for theftuously wasting and destroying the goods of William Lowsoune, burgess of Aberdeen, *for the space of ten years*, during which time the said Mr. John lay in adultery with Jonet Colestoune, spouse of the said William: And for oppression done to Mr. Duncan Burnet, Rector of Methlik, in unbesetting his way within his lodging in the Chanoury of Aberdeen and Cathedral Church thereof, where he was for the time celebrating Matins and divine service, invading and striking him to the ground several times with 'roungis and battounis,' &c.

It does not appear that further proceedings were taken in this case, so of course the verdict of posterity on the reverend gentleman

cannot be more severe than "Not proven." He was released on the surety of the Vicar of Innerkip, and was heard of no more.

One turns with relief to certain pages in this gloomy record, soon to become even gloomier, which contain reference to the paternal care of the Government in regulating the course of everyday business. It was usual to open the proceedings of the justice-aires, or assizes, held in the various towns, by a royal proclamation relating to sundry matters. A few of these have been preserved. By the proclamation preceding the justice-aire held at Elgin in 1556 the maximum legal price of all articles of food and drink is fixed. Wheaten bread must not be sold for more than 4*d.* for 22 oz.; Bordeaux wine is fixed at 12*d.* a pint, fine scherland (sherry sack) at 10*d.* "Guíd aill" may be sold at 8*d.* a quart, and the best mutton at 6*s.* the carcass. For "gryt chikkinis" (large chickens) no more than 4*d.* each might be charged, and for a pig 12*d.* A carcass of the best Scots beef must be reckoned cheap at 36*s.*, but any one who asked more ran the risk of confiscation of all his goods. Strange to say, not only the seller but the buyer was often punished for paying more than the statutory price. Tourists in Scotland at the present day may reflect with a sigh on the limitation set on hotel-keeper's charges, as follows:—

"And that thair be guid cheir throw all the toune for Gentillmen and thair servandis, for xi*d.* at the melteithe [meal-tide — *i.e.*, dinner] xi*d.*
The furneist bed, on the nycht, and that to freithe the chalmer [to be the whole charge for a bedroom] iii*d.*
The stabill-fie, for ane horse, xxiii*j* houris i*d.*"

Thus accommodation and board could be had at the dearest hotel, for horse and man, for 17*d.* a day. At the present time the traveller would perhaps not keep much change out of two guineas for the same.

A perusal of the collection of original documents compiled by Mr. Pitcairn up to 1560

creates a tolerably clear impression of the country over which Mary Queen of Scots came to reign. Perhaps there is nothing more pathetic in history than her attempt—nothing much more miserable than its failure. Dark and deplorable as is the broken chronicle up to this point, it deepens in horror as the reign proceeds. The slaughters, the blood feuds, the burnings, the ravishings—the "scuffling of kites and jays"—continue as before; but all these chronic crimes seem dwarfed into meanness by the series of events leading up to the explosion in Kirk-of-Field, and the terrible suspicion which still hangs round at least one name which one would fain hold in honor.

The circumstances connected with the murder of King Henry are too well known to all who have made any study of the history of this period to require more than a passing reference in this place. But any one who desires to refresh his memory, or seek new light upon them, cannot go wrong in reading over the depositions taken from prisoners and witnesses, which are arranged with admirable clearness by the editor of these volumes. In connection with them, certain grisly particulars may be noted in the Treasurer's accounts, showing how the remains of some of the deponents were disposed of.

"Jan. 13, 1567-8.—*Item*, to Johnne Broune, messinger and ane boy, passand to Edr. with clois writtingis, togidder with ye heid of Powrie, leggis of Johnne Hay, younger of Tallo, and Johnne Hepburne, of Boltoun, to be affixit on ye portis of Glasgow, Hammiltoun, Dunbertane, Air and Wigtoun iii*j* *℥* i*j**s*.

Item, to ane boy passand of Edr. to Leith, Hadingtoun, and Jedburgh, with pair leggis to be affixt xx*j**s*.

Item, to thre boyis passand of Edr. with ye rest of thair armes and leggis, to ye burrowis of Perth, Dundee, Abirdene, Elgin, and Inverness, to be affixt l*vs*.

Item, for crelis [baskets] and tursing of ye saidis heidis, leggis and armis; and candle for paking thair of x*s*."

Now it must not be supposed that, however frequent and flagrant may have been the failure or corruption of justice in these days, there were not plenty of good and earnest men in the land, jealous for the dignity and purity of the courts, and for the maintenance of equity and order. Their task was a hard—it must have seemed at times a hopeless—one, but we enjoy the fruits of their labors at this day.

The office of jurymen was coveted as little in the sixteenth century as in the nineteenth, and for weightier reasons. If the assize acquitted the prisoner on the evidence, they were liable to severe punishment in the event of the King or his advisers taking a different view. Thus, in 1537 Thomas Lawristoun of that Ilk and six other gentlemen were tried for perjury because they had acquitted the laird of Penicuik of mutilating Roger Tuedy of the "tholme" of his right hand, notwithstanding that "the said Rogeris tholme was schewin [shown] before thame . . . cutit away and mutilat." They were all sentenced to forfeiture of their movable goods, to be denounced infamous, and to be imprisoned for a year and a day; "and farther, induring the Kingis will."

There was made a pathetic appeal by certain "puir craftismene of ye burcht of Abirdene" to Queen Mary. They had been summoned to sit as jurors on a trial arising out of the blood feud between the Inneses and the Dunbars: never were men so awkwardly fixed between the devil and the deep sea. So they wrote to her Majesty, setting forth that—

"Like as we haue bene diuerse tymes this yeire summond of befor be youre gracis Pursewantis and Messengerris to pas vpoun Assise in actionis distant fra ws fourty, fifty and lx of mylis, that we knaw nathing thair of mair nor thai that duellis in Jherusalem: And swa [so], Ma dame, we ar hevely trublit and herreit [worried] heirthrow, be faille by [failure], abvse and misordour of the said Pursewantis and Messingerris, that will nocht summond Lords, Lairdis

and Barronis, as wes wount to be done in all tymes bigane, past memour of man, quhill [until] this instant yeir bigane;"

they craved and obtained excuse from serving except in actions arising in the burgh or three miles round.

Talking of juries, we may anticipate fifty years in order to note the remarkable change which had come over the social status of the Armstrongs, once the most irreclaimable rieviers and cattle-lifters on the Border. "Jok Scott, *alias* callit Jok the Sukler," was tried on a capital charge and condemned to death for sheep-stealing. This was a craft in which the Armstrongs had been experts not very long before, yet no fewer than nine out of the fifteen jurymen bore that redoubtable name, at the head of the list being "Frances Airmestrang, callit of Kynmonth," one of the "seven stark sons" of Kinmount Willie. This was in 1616: two years later there is further proof, not only of the comfortable circumstances to which the Armstrongs had attained, but how completely they had severed their ancient partnership in lawlessness with the Elliots. Gilbert Elliot, better known as Gib the Galliard, was sentenced to be scourged through the streets of Edinburgh and then banished for life, for having taken a purse, "ffourtie pundis being thairin, furth of Johnne Airmestrangis breikis."

Before taking final leave of Queen Mary's reign, it may be noted that in 1563 occurs the first entry of judicial proceedings against a witch. Perhaps no text of Scripture has ever been made the direct authority for so much inhuman iniquity as "Thou shalt not suffer a witch to live;" and the most cursory survey of the criminal records of the following reign cannot fail to show the prominence given to witchcraft in the chronicle of guilt. But in this solitary instance of a prosecution under Queen Mary, the death sentence was not pronounced, and Agnes Milligan of Dunfermline was only condemned to banishment.

During the minority of James VI. the Records of Justiciary were very imperfectly kept, and perhaps, have been wilfully mutilated by one or other of the prevailing factions. In the first year of his reign, justice was suspended for the reasons given in the following droll memorandum :—

"*Nota.* — Fra the hinderend of August, 1568, to the secunde day of Marche in the samin yeir¹ na Dyettis of Justiciarie haldin, be ressoun of the pest [the plague] and the Regentis being in Inglande."

But after the King attained his majority the proceedings began to assume a more regular form, they were more fully reported, and being almost wholly written in the vernacular, give much more vivid impressions of the scenes and actors. The language cannot fail to be interesting to the philologist, though a little perplexing to the general reader.

In modern English we have dispensed with the distinction between the gerund, or noun of action, and the present participle active, but these remained distinct in Scots of the sixteenth century. Thus in the following ditty against a forger (1576), he is "dilatit of airt and pairt of the treasonabill forgaing,

¹ The year was reckoned as beginning on 15th March, until in 1599, the King altered it by proclamation to 1st January.

feinzeing, etc., fals money, sic as penneis, quhilkis [which] wer out put be him amangis our souerane lordis liegis, dissanand [deceiving] thaim thairwith." Here the termination *ing* distinguishes the gerund the termination — *and* the participle. Many old French words are still in use in Scots speech ; others, which have disappeared, may be noted in these Records, as, "tressonable, blasphemouslie and *mischantlie* [from the French *mèchant*]" ; and again, "schote and *dilaschet* [old French *delascher*, to discharge] tventie schote of hagbuttis."

Then there was that other word of evil memory, the "row" (French *roue*), which happily occurs but seldom in Scottish criminal procedure. Indeed Mr. Pitcairn discovered only two cases in which a culprit was sentenced to the horrible fate of being broken on the wheel — the last being in 1604, when Robert Weir, the accomplice of the Lady of Warriston in the murder of her husband, was sentenced "to be brokin upone ane Row, quhil [until] he be deid; and to ly thairat during the space of xxiiij houris and thair-after his body to be tane upone the said Row and set up in ane publict plase, betuix the place of Warestoun and the town of Leith."

Truly there were some "ugsome" sights to meet the eyes of tourists in Edinburgh in gentle King Jamies' reign!



GRAECO-ROMAN CONVEYANCING.

THERE have been lately on view at Burlington House in the rooms of the Society of Antiquaries a very interesting collection of Graeco-Roman-Egyptian papyri. Most date from the first three centuries of the Christian era, and amongst them are a number of legal instruments, which enable us to see Roman law — or rather Roman law modified by local customs (a will, for instance, is attested by four instead of seven witnesses) — in practice. These deeds and documents, once so important to their owners, are written in Greek, without breaks between the words, much less punctuation; the wills, unlike our own, are engrossed lengthways, other instruments book (or roll) wise. The signatures of the parties and witnesses are generally in a cursive handwriting. As to the formal parts, persons are not identified so much by residences as by the names of their parents. For example, an agreement of apprenticeship begins: "Agreement between Tryphon, son of Dionysius, son of Tryphon, and ——— s, daughter of Onnophorus, of the one part, and Ptolemaeus, son of Pausirion, son of Ptolemaeus, and of Ophelous, daughter of Theon, of the other part, weaver, both of Oxyrhynchus." In wills they were even more particular. That of Acusilaus, son of Dius, ends with: "I am forty-eight years of age, and have a scar on my right foot, and my seal is an image of Thonis." As Acusilaus, son of Dius, would no doubt be embalmed, his right foot with a scar on it could be produced in evidence if the will had to be proved in solemn form. Probate and land registries are, indeed, no modern inventions, but, though we knew from Paullus (sent. 4, 6, 1) that after a will was copied it "had to be sealed with an official seal and deposited in the public archives, so that if the copies of it were lost fresh ones might be had from the original," the existence of such registries becomes a living reality, when we read

a request to "Epimachus and Theon, guardians of the archives," to register an inheritance. Dates were, as a rule, given in years of the reigning emperor. "Dated," winds up the apprenticeship contract, "in the thirteenth year of Nero Claudius Cæsar Augustus Germanicus Imperator, on the 21st of the month, Sebastos." Spacing of words and punctuation apart, the formal parts of a deed have changed little for the better since Acusilaus "being sane and in his right mind made his will in the street."

With respect to the contents of these documents, some relate to matrimonial troubles. One lady addresses a petition to "Heraclides, priest, chief justice," for recovery of her dowry, and another acknowledges the receipt of "400 drachmae imperial silver" (sterling silver as we should say), being the dowry paid over by her divorced husband. Money-lending was, of course, frequent. A woman, Thenet Roneis, acknowledges an advance of 16 drachmae from Gemellus, and agrees to work in the latter's vineyard, a certain amount being deducted from her wages until the 16 drachmae have been paid off. Isaac Gordon might take a leaf out of the book of Gemellus. Imagine Mr. Street one of Gordon's clerks! Perhaps, however, we are doing Gemellus an injustice. He acknowledges at the foot of the contract that he has been paid off and has no further claim.

The apprenticeship contract is in places curious. "The boy is to be fed and clothed during the whole period" (one year) "by his father, Tryphon, who is also responsible for all State imposts upon him" (were these, so to speak, the stamp duty on the articles?) "on condition of a monthly payment by Ptolemaeus" (the master) "of 5 drachmae on account of victuals, and at the termination of the whole year of a payment of 12 drachmae on account of clothing. . . . If ever the boy misbehaves himself, Tryphon shall produce

him for an equivalent number of days after the period is over" (a useful proviso) "or shall pay for each day 1 drachma of silver." The penalty for a breach of contract by either party is to be 100 drachmae and an equal sum to the treasury." Since "an equal sum to the treasury" occurs in other documents, we suspect that the judges had orders not to enforce payment of fines unless the State gained as much as the successful suitor.

But, characteristic of the ancient world as are the above, the will of Acusilaus is still more characteristic. Through it we catch a glimpse of the toiling millions who did not then work for a living wage but for a living meal. Acusilaus, after reserving to himself a power of revocation, grants freedom to a few slaves, and then proceeds to declare as follows: "I leave my son Dius by my wife Aristous . . . if he lives, and if not his children, heir" ("or heirs" might have been added) "to all the property that I shall leave and to my other slaves and to the children that may hereafter be born to the female slaves, but during her lifetime my said wife Aristous . . . shall after the taxes are paid" (the Inland Revenue again!) "have the use of and all the revenues from the above property in-

cluding the slaves." One passage in the will must, however, have cheered the human cattle. Acusilaus directed that 100 drachmae of silver should be paid each year to provide a feast for the slaves and freedmen to be held on the anniversary of his birthday. Lucky slaves! They might be joyful if their joy did honor to the deceased master.

The above translations, like the papyri, have been given to the public by the Egyptian Exploration Fund, and we must express our acknowledgments to the translator or translators. We would recommend the Inns of Court and the Incorporated Law Society to subscribe heavily to the fund. Roman law is the foundation of modern law, and only persons who pay their debts by the Statutes of Limitations will deny it. Everything, therefore, which tends to make Roman law more real to modern eyes is of the highest value, and, if Professor Petrie and Mr. Grenfell are sufficiently encouraged, we may soon be able to reconstruct a Roman Law Conveyancing Book from actual precedents. But, who knows, a Roman Davidson may itself be discovered.

— *The Law Times*.



THE SUPREME COURT OF WEST VIRGINIA.

III.

BY J. W. VANDERVORT OF THE WEST VIRGINIA BAR.

SOME men have such marked personality, mentality and inherent strength that they impress their time and age with the stamp of their genius.

Such a man was Judge Haymond. Like most men who are not born great and had

not greatness thrust upon them, but who achieved it, he came from the humbler walks of life. He was born upon a farm near Fairmont, Virginia, December 15, 1823. He was a son of Col. Thomas S. Haymond and Harriet A. Haymond. His early life was uneventful and was much the same as that of other boys growing up under similar surroundings, but even in his youth he showed the vigor of thought and bold independence characteristic of his later years.

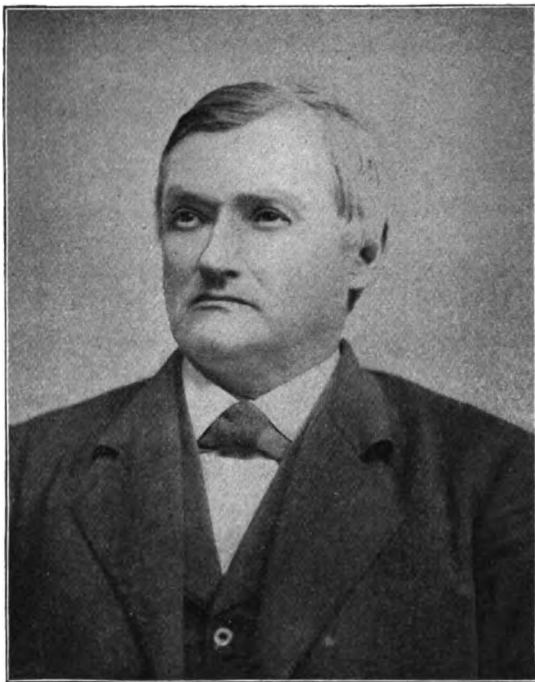
He attended the Morgantown Academy, an excellent school of its day, for two years, and later studied law with Edgar E. Wilson of Morgantown and was admitted to the bar in 1842, when only nineteen years of age. He soon became recognized as an able lawyer and had a lucrative practice before the war. It may be here remarked that in Western Virginia and in many Southern

States the Rebellion of 1861 is a period marked in the lives of men even yet living, for it was then that home ties were broken, offices were closed, the ordinary avocations of life were turned over to other hands and the youth and chivalry of the South, moved

by varying impulses, went forth to war, with the North or the South.

Even in 1853 and 1857 he was a member of the Virginia Assembly, and in the Richmond Convention of 1861 opposed secession; but after hostilities begun he entered the Southern Army and remained there until General Lee surrendered at Appomattox.

He returned to Fairmont and resumed his practice. By an act of Congress he was relieved from disabilities arising from his relations with the South.



ALPHEUS F. HAYMOND.

He was in 1872 a member of the Constitutional Convention, and at the election held under it he was elected a Judge of the Supreme Court of Appeals to fill a short term, and in 1876 he was elected for a full term of twelve years. He resigned this position, to take effect January 1, 1883, on account of failing health and business responsibilities.

Prior to his resignation and after its an-

nouncement and when the Supreme Court was in session in Wheeling, the bar of Ohio County on December 16, 1882, the last day of the fall special term, adopted the following resolutions :

"Resolved, That the members of this bar have learned with deep regret that Judge Haymond has determined to retire from the labors and duties of the bench which he has for many years adorned.

"Resolved, That it gives this bar pleasure to express their sentiments of sincere respect for Judge Haymond, which have been inspired by the capacity, the accurate learning, the patient and persistent investigation, the anxious desire to do justice, and the courtesy he has uniformly accorded to the members of the bar, which have distinguished him throughout his long period of service on the bench of the Supreme Court of Appeals.

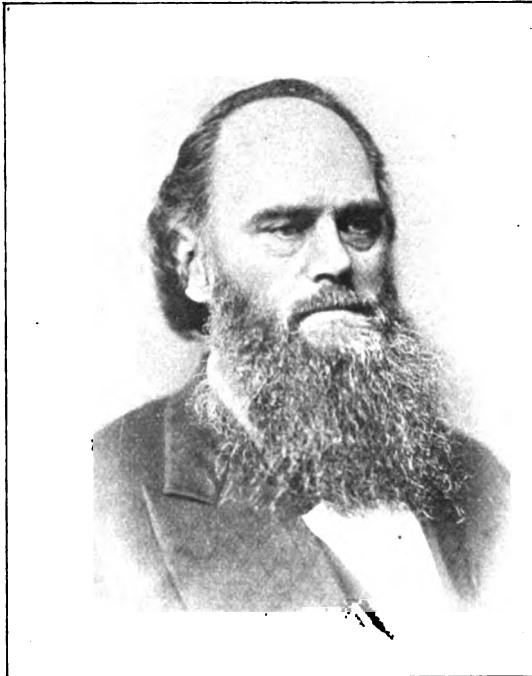
"Resolved, That the committee by whom these resolutions have been reported be requested to present them to the Court and ask that they be entered on the minutes."

To these resolutions and the remarks then made Judge Haymond made apt reply, and among other things in speaking of the congested docket he used this language :

"No matter how great the increase of your docket, elaborate and consider well the principles of law and equity involved in each case upon which you are required to pass, even

though it requires the consumption of much time and labor to be able to perceive and determine upon those principles of law and equity involved which are correct. The public interest and welfare is involved to a great extent in the correctness of the principles of law and equity which you announce and establish by your decisions. Upon their wisdom and justice depends, to a great extent, the security of the lives, liberty and property of

the citizens. The public expect, and the public interests demand, that the principles of law and equity declared and established by you in every case shall be correct as nearly as may be. And the intelligent public equally expect, and demand, that you shall devote such a reasonable amount of time to the investigation and consideration of each case, and the principles involved therein, as is necessary to accomplish this desirable end as nearly as may be expected by human



JOHN S. HOFFMAN.

judgment with the aid of the lights and means at command. The public is more deeply interested in the correctness of the principles of law and equity which you establish by your decisions in each case you decide, than the number of cases which you decide in a given time. The establishment of correct, just and wise principles of law and equity, and the making of correct and just decisions in each case, should be the paramount object of the court of last resort. To accomplish this great object the proper and necessary time must be

devoted to each case, even though it cause delay in the decision of other cases. Hasty and ill-considered decisions are unprofitable to the public, unreliable as precedents and authority for the legal profession, or the citizen, and discreditable to the court that makes them." From these words we may gather something of his ideas of the duty of a judge.

Judge Haymond was a man of medium height, heavy build, of a round contour. A man of agreeable and graceful manners and of even temper. In his later years he was not actively engaged in practice except in the Supreme Court.

Judge Hoffman was born in Weston, Lewis County, Virginia, June 25, 1821. He was educated in the common and select schools of the State, and about 1841 began the study of law at Clarksburg, Virginia, with his uncle, Judge G. D. Camden, a prominent lawyer of the State.

He was a young man of good habits and of a modest, unassuming disposition, and was a careful methodical student. From the outset of his career he seemed to be imbued with the idea of making a success in his profession, and at the same time that no act of his should cast a stigma upon his honor as a man. He lived a life of labor and of self-denial in his early professional life; he devoted himself to a careful study of the land laws of Virginia and invested largely in the timber lands of the State, which he was able to purchase at that time at a very low price. There have been few lawyers in Virginia who have surpassed him in his legal knowledge on all questions affecting land titles.

He was agreeable and attractive in his manner, and became quite popular with the people. He was a pronounced Whig in his politics but did not take an active part in the political campaigns. In 1858 or 1859 he was elected on the Whig ticket a member of the Virginia Legislature, and although the county was largely Democratic, by his popularity he overcame this majority. He was not ambitious politically and did not oc-

cupy any other official position until in 1872 he was elected a member of the Supreme Court of West Virginia. On account of sickness he was obliged to be frequently absent from attendance on the sessions of the court, but his opinions were marked by thoughtful care and an accurate knowledge of the law.

On account of sickness he resigned his position on the bench in 1876, and retired to his home in Clarksburg, where he resumed the practice of the law and the care of his property, and died November 18, 1877.

He was in the South during the War, and in his later years was a member of the Democratic party. His devotion to his profession and his success therein is a worthy example to the young men of the present day, and he in his life well exemplified the adage, "There is no excellence without great labor."

The judge was a very large man, and about the only amusement in which he engaged was a game of euchre or whist now and then with his friends that he might invite to his rooms at his hotel. The judge was a bachelor all his life, and boarded at one of the hotels in Clarksburg. One evening, as one of his friends tells the story, he, together with Elisha W. McComas and A. A. Lewis, were invited to the judge's room for a friendly game of cards shortly after the close of the Mexican War. This friend and the judge were partners and beat McComas and Lewis three times in succession, and each time taylored them. The victors, of course, were elated and bragged of their success. Thereafter the tables were turned, and the Judge and his partner were beaten every game although they were never taylored, but their rejoicing over their later victory became very excessive and the judge's friend very much quieted the excessive enthusiasm by remarking that "We prefer Bragg to a Taylor." This reference is to Taylor and Bragg of the Mexican War. After hearing this story I at once consulted the dictionary to ascertain the meaning of the word taylor, but failing, I

endeavored to find an explanation in General Schenk's work on cards; failing in this I knew one final and last resort on a matter of this source and consulted the Honorable C. T. Caldwell, who is well recognized as an eminent authority by the profession in this State on a subject of this kind. On stating my dilemma to him he immediately entered into a lengthy discussion on the various terms used in cards, and ended by saying that in common parlance the word *tailored* in cards means *skunked*, or in other words, to be whitewashed. I make this explanation that the term may be fully understood.

Judge Hoffman left quite a fortune at his death, and under his will devised the greater part of it to his near friends and relatives; and as evidence of the friendship and devotion of his earlier years he left special legacies with which to procure handsome rings and other jewelry for certain lady friends of his early years, and to purchase gold-headed canes for some of the best friends of his later life.

Thomas C. Green was the son of Judge John W. Green of the Court of Appeals of Virginia. He was born in Culpepper County, Virginia, November 5, 1820. The father went on the Court of Appeals bench in 1822. A number of the family were lawyers and became quite eminent in the profession.

Thomas resided with his father in Culpepper County until 1843, when he began

practising law in Jefferson County, Virginia; while here he married a daughter of Col. Angus McDonald, a prominent Virginian.

Since 1852 he continuously resided in Jefferson County, except during the period of the war, until the time of his death. He became a successful lawyer in Hampshire and Jefferson counties prior to the war in 1861. He was a private in the Southern

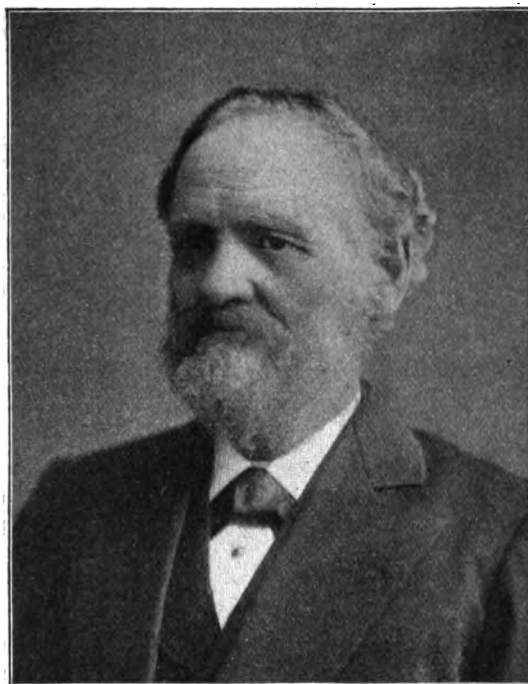
army in the "Baltimore Grays," and served two years in "Stonewall Jackson's Brigade." He was then appointed chief collector of the Confederate taxes for Virginia, and continued in this position until the close of the war. During the war he was elected and served two terms in the Virginia Legislature.

In 1876 he was elected to fill the four years' unexpired term of Judge James Paull, on the Supreme Court of Appeals of West Virginia, and in 1880 he was elected for a

full term of twelve years, and died December 4, 1889, after having served on said court as one of its judges for fourteen years.

His opinions are found in volumes 9 to 33, inclusive, of the West Virginia Reports.

No judge on any bench probably ever gave to the questions submitted to him such complete and exhausting research and consideration. In fact, in many opinions he traced the law step by step; in its windings though they may have been, down to the date of the opinion, considering and referring to the various



THOMAS C. GREEN.

authorities, English and American, pro and con thereon.

Two cases deserve special mention, *Radford v. Carwile*, 13 W. Va. 572, on the rights of married women in West Virginia, and *Pegram v. Stortz*, 31 W. Va. 222, on the question of "Damages." This is the longest opinion he ever wrote and covers 107 pages, and is quoted almost entire in the English and American Encyclopædia of Law. His opinions are widely quoted in the text books and reports of other States.

In the memorial presented to the meeting of the bar held in Charleston in the Supreme Court chamber, January 18, 1890, in his memory, and from the addressess there made, I quote as follows:

"In the discharge of his official duties his industry was patient and indefatigable. He had a strong love for pure mathematics, a love which displayed its influence in all his processes of reasoning, and there is something of the strict and close logic of algebraic demonstration in his legal opinions. He knew nothing of the parties to any controversy which came before him for decision; he often failed even to remember the names of the litigants; the plaintiff and defendant were to him as impersonal as the letters of an equation, and he applied himself to the solution of the questions presented as if he were searching by known and inflexible processes for an unknown quantity. Truth was the ob-

ject of his search, and he followed it with an unerring judgment.

"When engaged in the investigation of a judicial question his mind would sometimes become so completely absorbed in the train of his thoughts as to make him forgetful of the demands of physical comfort and bodily health, and this no doubt shortened his days.

"In the discharge of his duties he could always be relied on with absolute confidence

in those exigencies which require firmness and ability,—no public clamor or fear of personal unpopularity could influence his conduct. Undemonstrative and apparently indifferent to the regard of others, he was truly kind-hearted and fond of conversation and society.

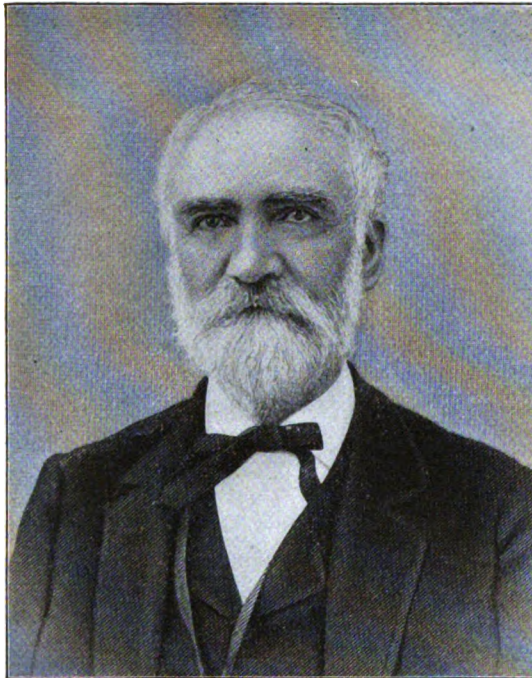
"His nature was simplicity itself; confiding and loyal in his friendships, but firm and uncompromising in his convictions of right and duty."

These words give as complete an idea

of the character and quality of the man as a sketch of this kind will permit.

The best story I have heard of the extent to which Judge Green's abstraction would lead him when involved in the study of a cause is as follows:

Judge Synder at one time went into Judge Green's room where the latter was deeply absorbed in the study of an intricate question of law involved in a case before the Supreme Court. They immediately began a discussion of the question. Judge Snyder in order



HOMER A. HOLT.

to test the extent of Judge Green's abstraction, pointed to a spot on the floor as a matter of great interest, but still continued the discussion; he finally got on the floor and was followed by Judge Green. Judge Snyder then crawled under the bed and was closely followed by Judge Green, the discussion still continuing. Finally as Judge Green crawled out from the other side of the bed he exclaimed as did Archimedes, the ancient philosopher, "I have found it, I have found it," referring to the point in the cause, and not to what was supposed to have been lost on the floor.

On the 27th day of April, 1831, Judge Holt was born in Parkersburg, Virginia. He was the son of Jonathan and Eliza Holt (Wilson). The family of Judge Holt came from England in colonial days, and settled in the neighborhood of Norfolk, Virginia, where his grandfather John Holt was born, and who in 1794 moved to and settled in the Monongahela Valley.

Judge Holt's ancestors on the mother's side came from New England and the north of Ireland, settling at Fort Pitt, now Pittsburgh, and below there on the Ohio River, at the close of the Revolution. His father was a man of great natural ability and was educated as a physician and afterwards in the law, in both of which professions, so long as he followed them, he succeeded. From him the judge inherited many of his best qualities, and to him he bore a very marked resemblance.

He was educated in the common and select schools of the day and by private tutors; afterwards was a student at Rector College for two years. From there he went to the University of Virginia where he attended two sessions, the session of 1849-50 and that of 1850-51. The method of teaching in the University of Virginia is by different schools, a diploma being issued in each separate school. During the first year at the University of Virginia Judge Holt received diplomas in five different schools; at the end

of the second year in four other different schools, a record that has been unsurpassed by none, and equalled by few. After graduating at the University he taught for two years and then studied law with Benjamin W. Byrne, after which he began the practice at Sutton, in Braxton County, and in this and adjoining counties he practised law for many years.

He, during the Rebellion, joined the South, and in 1862 was captured and confined in prison at Camp Chase, where he remained for about one year. After being liberated he joined what is known as "Jenkins's Brigade," then at Salem, Virginia, afterward commanded by General McCausland, where he served until April, 1865.

He was a man above medium size, had a large head and a broad, projecting forehead, and was of a studious and thoughtful turn of mind. Both the imaginative and practical were predominant qualities in his character; from the one he was able to foresee the future material development of the natural resources of our State; by reason of the other he invested largely in mineral and timber lands from which he acquired a competence.

At Sutton, in Braxton County, he married Mary A., daughter of John Byrne.

In the Constitutional Convention of 1872 he was a member, and was on the committees on judiciary and land titles, and discharged the duties with fidelity and marked ability.

In 1872 he was elected judge of the Circuit Court and served in this capacity in two different circuits for sixteen years, declining re-election.

From 1874 up until January 7, 1898, the time of his death, his home was in Lewisburg, Greenbrier County. He gave attention to his large landed interests and to other enterprises in which he was engaged.

November 8, 1890, he was appointed one of the judges of the Supreme Court for the unexpired term of Judge Adam C. Snyder, and in 1892, that being the date of the next

general election, he was elected for this unexpired term of four years, making six years in all that he served upon the Supreme Court.

A better idea can be had of the character and standing of Judge Holt from a letter written by one of his lifelong friends, during Judge Holt's sickness, than from any picture I can portray. From this letter I quote as follows :

"As a lawyer he had few equals in the State as to general and thorough knowledge of the law, laboring very hard all his life from his school days down to the time of his death in order to store his mind with information touching his profession. He read very extensively the current reports of this and other States and from the English decisions. As far as I heard any expression from others while he was on the Supreme bench, it was to the effect that he was the leading member of the court; besides he always, even in his later years, kept up his academic studies, particularly Latin and French, the various branches of mathematics, geology, chemistry and history. During the war he was for one year in prison. One of his coprisoners was a Frenchman with whom he studied and talked French as a pastime, and also during that period read law, and as he said thereby almost entirely relieved himself from the monotony of prison life. In some respects I never knew his equal. He was so systematic in all his studies that he could ac-

complish more reading and study in his profession than most people, at the same time keeping up his general reading on all subjects of a literary and scientific character. I have often estimated that he spent fourteen hours a day on an average throughout his whole career in literary work. He was the most even-tempered man I ever knew, always the same, treating all alike. Rarely even speaking ill of any one, and es-

pecially showing the same deference to all with whom he associated from the highest to the lowest. In his ability to do this he exceeded any man I ever knew."

It would be of little avail for me to attempt to add much to this encomium that has been passed upon his life and character by his long and faithful friend. In his method of study, kept up to the last years of his life, he more resembles that of Rufus Choate than any man I have known.



HENRY BRANNON.

Judge Holt was related to Lord Chief Justice Holt of England, and in the high position he took for ability and learning at the bar and on the bench he was a credit to any family and any race in any age.

Judge Brannon was born November 26, 1837, in Winchester, Virginia. He was educated at the Winchester Academy and later graduated at the University of Virginia. While a boy he attended school at Weston, Virginia, taught by Homer A. Holt, who had just graduated at the University of Virginia,

and who afterwards became one of the most distinguished judges of the Supreme Court of Appeals of West Virginia, and for a number of years Judges Holt and Brannon — teacher and pupil — sat together as associate judges.

Judge Brannon began the practice of law when twenty-one years of age, and when at the bar about one year he was elected Prosecuting Attorney of Lewis County. He was also later elected to the same office.

In 1880 he was elected judge of the eleventh Judicial Circuit for the term of eight years, and in 1889 was elected a member of the Supreme Court of Appeals for the term of twelve years, closing with the present year. He married Miss Hetta J. Arnold.

Judge Brannon while at the bar was one of the ablest lawyers of the State, was careful, methodical and painstaking; as an advocate logical and eloquent, and won, by his superior skill, many a hard fought cause.

Since he has been upon the bench, for almost twenty continuous years, his reputation as a lawyer and judge is not, perhaps, surpassed by any lawyer in the State.

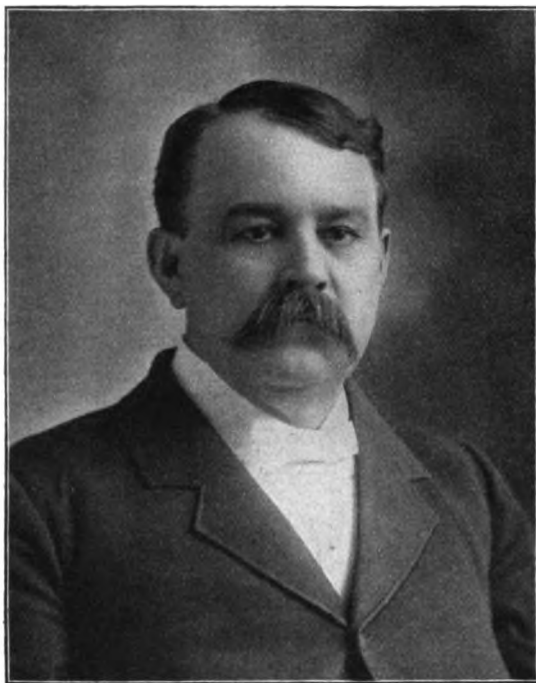
He is yet a vigorous man. In physique he is large and well proportioned. He is capable of great labor and gives to his position a well-trained mind. In manners he is suave and courteous, is a most congenial companion of young and old. He is a true type of a Virginia gentleman. He is wise enough

to gather wisdom from all sources where it may be found, and is not averse to discussing knotty legal problems with the young members of the bar.

In politics he has been a Democrat, but is quite liberal in his opinions and in the regard in which he holds the opinions of others, and since the campaign of 1896 is understood to have allied himself with the Republican party.

The youngest judge of the Supreme Court

of West Virginia is Judge Dent. He was born in Monongalia County, April 18, 1849. He is the son of Marshall M. Dent and Mary Caroline Dent, the latter a daughter of Dr. D. W. Strong of Quincy, Mass. From both sides of his family he inherits strong qualities of mind. His grandfather, Dr. D. W. Roberts, was an original Republican, a man of prominence in his day, and a delegate to the convention at Chicago that nominated Abraham Lincoln for President.



MARMADUKE H. DENT.

Judge Dent, however, has always been a Democrat.

His early life was spent in his native county. He graduated from the West Virginia University in 1870, and was the first graduate of that institution. After graduating he was a teacher for some years, and in 1875 was admitted to the bar and practised law at Grafton, Taylor County, for almost twenty years. In 1892 he was elected a member of the Supreme Court of this State. He is now the president of the court.

He is of a judicial mind, and achieved success at the bar before he went on the bench. He is an eloquent and logical speaker. Has the capacity for hard work, and gives to the causes submitted to him an intelligent mind carefully trained, and his opinions are marked by the most careful research and supported by ample authorities. It is not unusual for him to support his judgment with a line of opinions unanswerable, and on points deemed only secondary by the counsel in the cause, and yet, after reading the opinion of Judge Dent, they readily observe their weight and correctness.

Judge Dent is conscientious and of a deeply religious character. He is often in his opinions and reasoning quite facetious and novel in his style. In the recent case of *Atkinson v. Plumb*, 45 W. Va., a controversy between two members of the same church, he uses this language: "But while it was the hand of Esau, it was the voice of Jacob. His confidence was abused under the guise of friendship, which blinded his eyes and he was despoiled by those of his own household; and with the earnest plea for retribution he seeks justice against his despoilers. What we have we freely give unto him,—the suit appears to be a contest over a bag of wind."

Judge Dent is of a genial disposition, agreeable and gentle in his bearing, positive in his convictions, fearless in their expression, quali-

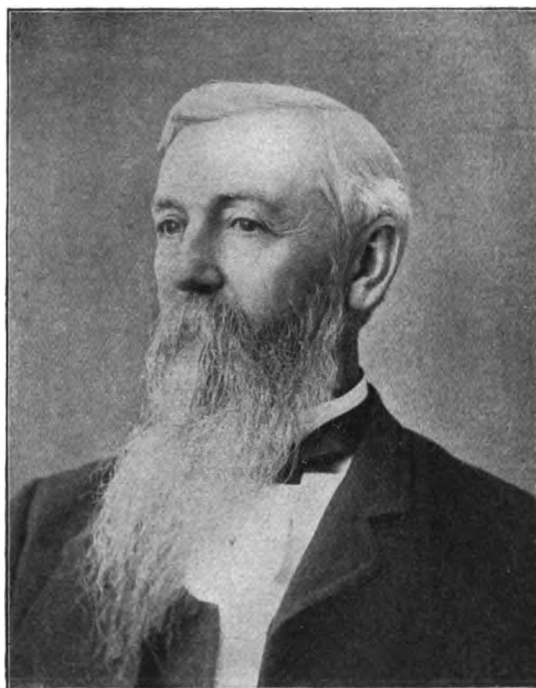
ties that fit him to so ably fill the position he now occupies.

It has been my pleasure to know him intimately in college and in the intervening years, and the qualities he displayed in his college days have ripened into a rich fruitage.

He is still a young man, and bids fair to take a still more prominent part in the State and nation.

Some men have a tendency in their disposition to soon wander away from the paternal roof tree and the State of their birth and early youth.

Not so with Judge English. He was born January 31, 1831, in Jackson, Virginia, now West Virginia, and is the son of Job and Mary Warth English. When only four years of age he, with his parents, removed to Malden, Kanawha County. He attended the common schools of his neighborhood until he was sixteen years of age, when he was sent to Illinois College,



JOHN W. ENGLISH.

Jacksonville, Illinois, where he took the full course and graduated with honors at the age of twenty years. He was not able at once to engage in the practice of the law for which he had prepared himself, but for some time aided his father in his mercantile and salt manufacturing interests.

Judge English continued his studies during his spare hours under the direction of his uncle, Judge Warth, Judge Summers and other prominent attorneys, and in 1855 be-

gan the practice of law in partnership with Henry J. Fischer, Esq., of Mason County, one of the most prominent lawyers in the State. Mr. Fischer was very fond of a joke, and at one time Judge English in his early career was a candidate for Prosecuting Attorney, his opponent being Judge Moore. On his return from one of his electioneering trips Mr. English, as the story goes, came into Mr. Fischer's office and said: "I found one of the oddest old men up on Twelve Pole Creek; he said he liked my appearance and would like very much to vote for me, but he had registered a vow never to vote for a lawyer. Now, Mr. Fischer, what would you have said to him?" "Oh," Mr. Fischer replied, "I think he could vote for either you or Moore and not break his obligation."

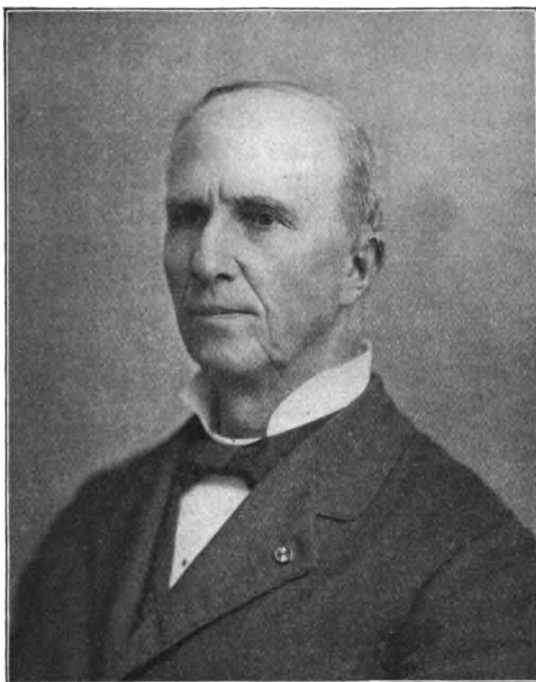
Judge English is a man of quiet and retiring disposition, exceedingly modest. He has lived most of his career in Mason County, the county adjoining that in which he was born. He has engaged but little in the political contests in the State, and has devoted his time to the duties of his profession. His literary education and studious habits fit him for the position of judge. He was, in 1888, elected judge of the Supreme Court for twelve years; his term expires December 31, 1900. Judge English has shared with his associates on the bench a reputation for honor and ability; he is particularly well versed with the law relating to wills and es-

tates, and many of his opinions have been widely quoted beyond the borders of his State.

He is tall, wears a long beard that is now becoming whitened by the touches of time, and would be taken anywhere for what he is, a Virginia gentleman. He married, May 6, 1862, Miss Fannie Lewis, belonging to one of the oldest families of the State of Virginia, made famous by the deeds of bravery

of one of her ancestors, General Lewis, in the battle with the Indian chief Cornstalk, at Pt. Pleasant, in 1774, October 14th. At this place Judge English resides in the quiet of peace, with his family.

Henry C. McWhorter, since 1841, has been a resident of what is now West Virginia. Since 1865 he has been a lawyer in the city of Charleston, in this State. For some years he resided in Roane County, and in 1865 was a member of the legislature from that



HENRY C. MCWHORTER.

county, and in 1866-67 and 1868 was a member from Kanawha County, and the latter year was the Speaker, and faithfully and efficiently performed the duties of that office.

In 1885-87 he was also a member of the legislature from Kanawha County. He was born February 20, 1836, in Ashley, Marion County, Ohio. He lived on a farm during his youth, and was later clerk in a drug store. He served in the federal army, beginning as a private, and in 1863, while a captain, resigned on account of his wounds.

He has been a successful lawyer, and is a very estimable gentleman. In 1896 he was elected a member of the Supreme Court of Appeals of the State, for the term of twelve years.

He is a prominent member of the Metho-

dist Episcopal Church, and in all his dealings is a man of the nicest sense of honor.

He is an able and careful judge. He is about six feet in height, well proportioned, smooth face, is gentle in his manner and gracious in his bearing.

THE MAFIA.

BY GINO C. SPERANZA.

FEW there are who have not heard and enjoyed Mascagni's "*Cavalleria Rusticana*," and fewer yet who have not played, sung or whistled its popular intermezzo. But how many of us while watching the brilliant groupings on the stage and listening to the stirring music have thought that we were spectators to a Mafia drama, and that the intermezzo was but the calm before the storm,—typical of the Mafia procedure as we shall see later on? "Rustic chivalry" is what the English translator calls it, and, in a certain sense, that is as good a definition of the Mafia as can be given, for, as a very recent writer has said, "the Mafia cannot be defined, it can only be described."

There are so many wrong and even absurd ideas about the Mafia that it will not be amiss to endeavor to describe it as it really exists; in doing this I shall draw freely from the excellent and reliable works on the subject by Prof. Vaccaro, Pitre, Lombroso, Tomazzini-Crudeli and other minor students of this question.

In the first place the Mafia is not, as is often thought, a criminal association having membership in every part of the Italian Kingdom. It is strictly confined to Sicily, and is the product exclusively of Sicilian history, life and character. It is entirely separate from, and in no wise similar to, other sects or associations of evil-doers, such as the Camorra of Naples, the ancient Holy Vehme or the White Caps of our own country. That it has adherents not only among

the poor and low caste, but also among the rich and influential, has been amply demonstrated by the evidence given at the Notarbartolo trial at the Milan Assizes, in which distinguished Palermitans were accused of having instigated the assassination of the director of the Bank of Sicily.

But the most common mistake is that of considering the Mafia an association or sect. I have used both these names in describing the Mafia only for lack of better words, but I will now endeavor to give them their real meaning. In order to fully understand it, however, it will be necessary to take a rapid view of Sicilian history, for therein lies the key to the whole question.

Sicily, the Paradise of Italy as it has been called, has been a coveted prize from time immemorial. Long before Greece and Rome sent their legions to subdue it, the Carthaginians and the Phœnicians harassed the island for nearly two centuries but never succeeded in subjugating it. Greece and Rome were not any more successful, even despite the underhand methods adopted by the latter. We have all heard of the frightful rule of Verres, of the incursions of the Vandals, Goths, Byzantines, Arabs and the Normans, who each in their time made of Sicily a desert place as much as lay in their power. Yet the Sicilians never willingly submitted to the foreign invader, and when the Norman monarchy established itself in Sicily it was with the free consent of the people assembled in Parliament. Thus, as

has been recently remarked, "Sicily had a Parliament half a century before England, and by heroic efforts maintained it as a free institution for seven centuries." No wonder, then, that one of our most scholarly poets and essayists has found inspiration in the glorious history of the island for one of his noblest and strongest writings ("Taormina," in Prof. Woodberry's "Heart of Man").

Passing to a later epoch we find that, true to their ideals of freedom and justice, they repaid the breach of faith of Charles of Anjou in depriving them of certain franchises he had sworn to protect, by the famous insurrection known as the Sicilian Vespers. Charles's successors down to the Bourbon Ferdinand I. respected their rights, and when this last one, carried on the wave of reaction which swept over Europe after the treaty of Vienna, dissolved the Sicilian Parliament he signed the downfall of his dynasty. Thrice they revolted against his House and thrice they were mercilessly put down; undaunted they rose again in 1860 and this time drove the tyrant from the land.

Hence we see that the Islanders, ruled from time immemorial by foreign powers, which, though they never wholly subjugated them, constantly despoiled and oppressed them, came to have an instinctive hatred of the law and distrust in the ruling classes. These, as we shall see, are characteristics of the Mafia.

This hatred for the ruling powers was accentuated by the excesses of Bourbon tyranny, and led to a bitter underhand warfare between the rulers who, unable to fight openly, did not scruple to stoop to the most dishonest practices, and the ruled who naturally could only cope with their oppressors by the methods of conspirators. Secret societies were formed which were at that time mostly patriotic in intent, inasmuch as while they strengthened the fraternal bonds of the oppressed they also aimed to drive out the oppressor. And this will serve to dispel the current fable that a statesman like Crispi is a member of the Mafia. He probably was

such in the days when the Mafia drew to itself all lovers of liberty, and when it had the same ideals as other patriotic secret societies such as those of the Carbonari and the Mazzinian "Young Italy."

With the downfall of the Bourbons the existence of the Mafia ceased to have a legitimate excuse. But, partly through economic conditions, partly through the insufficient attention of the new government to the needs of Sicily, but mostly through the deep-rootedness of the fundamental principles in the heart of the people, it still lived and still lives, though shorn of its good and worthy points. A great many Sicilians, especially the older ones and those who have come into least contact with the new regime, still distrust the government in its executive, legislative and judicial branches, and others who would break away from the past are bullied into submission by threats.

The survival of the Mafia in our day is due, as I have said, to the fact that its fundamental principles have been ingrained into the very nature of the Sicilian population. Thus the oft-mentioned "*omertà*," which is the duty incumbent on all Mafiosi of taking the law into one's own hands, finds its counterpart in many Sicilian proverbs, such as, "Evidence is an excellent thing provided it does not hurt your neighbor;" "Whoever takes from you your daily bread, take from him his life;" "First think of your weapons, then of your wife."

But to return to the main question, "What is the Mafia?" It is not, as I have said, an association or a sect, but may be likened to that institution in various countries, not excluding our own, which has for its supporters the followers of the Code-duello. Believers in such principles cannot be said to constitute an association or sect, and so it is with the so-called Mafiosi, who may be described as persons who hold that, "No man can be called such who cannot make himself respected without resorting to law." Hence the name given it of "rustic" or "lowly chivalry," as dis-

tinguished from the blooded chivalry of knight errants and their ilk.

The Mafia having no organization proper can have no leaders. Nevertheless, just as among duellists there are those who by reason of unfailing success gain a certain notoriety, so it happens that there are Mafiosi who become leaders by silent acclamation through their bravery in fighting or their cunning in escaping punishment.

It is not to be imagined that a Mafioso, no matter how powerful, can be distinguished by the uninitiated through any bearing of braggadocio or through any outward sign. "The real Mafioso is generally humble in appearance, talks and listens quietly, and shows the greatest patience; if offended in the presence of others, he will not retort, but later on he will kill."

Just as it was incumbent upon all men of noble blood to observe the fixed and well-defined rules of chivalry and knighthood, so likewise the "rustic chivalry of the Mafia" has a distinct code which its disciples must observe. This, as we shall see, is adhered to most scrupulously.

This code of honor is known to all students of crime as "*Omertà*." It is an unwritten law which every Mafioso knows almost by instinct, just as we may be said to feel the moral law. The chief provisions of this code as given by Pitрэ and Maggiorani are, the absolute reticence and silence of a spectator regarding crimes committed in his presence; the duty, in case of need, of supplying false evidence so as to save the perpetrator; the carrying of weapons without a license; the revenging one's self for injuries suffered without the "infamy" of resorting to law.

The procedure followed will appear from the following examples: Two Mafiosi get into a dispute; after a while one of them will calmly say to the other, "My friend, you are right," and apparently the matter is settled. But it is but a seeming calm. If the one party feels that he has been slightly

offended, or is uncertain whether any offence was meant, he will interview his late opponent and ask for an explanation. This may lead to a stabbing or to a peace-making over a bottle of wine. If, however, the aggrieved feels he has been grossly insulted then two ways are open to him according to the *Omertà* Code. He may, in the first place, without loss of time, meet his offender in some solitary place and must thereupon ask him if he is armed. If, as is unusual, he should not be armed, then the challenger must allow him time to get himself a weapon. No further preliminaries are necessary, and the actual fighting must thereupon proceed without any rules. Time ago, however, a distinction was made, as in Verga's "*Cavalleria Rusticana*," between a "*tirata in cascìa*," where all blows must be aimed against the trunk (this more dangerous form being used to wipe out serious insults), and a "*tirata in musculu*," where the blows must be directed only against the members. The victorious party kneels over his wounded or dead enemy, kisses him, and goes his way as if nothing had happened.

The second method open to the offended and allowed by the *Omertà* Code is for him to abide his time, in the meanwhile making it appear that he has forgotten the incident. But neither the offender nor the offended forgets that there is a feud between them, and some fine day one of them is killed, either openly or in ambush.

But the most striking rule of *Omertà* is that which imposes upon the Mafioso the duty of reserving to himself the right of punishing his offender, and, in case of the law trying to assume the vicarious punishing of his enemy, the duty of placing every obstacle in its course. Vaccaro gives an interesting case. "A was mortally wounded by B in the presence of C. A on his deathbed declared to the representative of the law that he did not know who his assailant was, but before dying he told his brother that B was the assassin. The brother, instead of help-

ing the police, allowed them to go on a false scent and arrest C. This latter, who knew what had been done, instead of accusing B simply called him as a witness at his trial. C was indicted for A's murder, but the day before the trial the real assassin was murdered by his victim's brother, and it was only through this second murder that C was found to be innocent. He had been in jail two years, but had never accused the real culprit. This is no imaginary case, but can be verified by the records of the Girgenti Asizes."

In conclusion I wish to emphasize the fact that not all Sicilians are Mafiosi; they are a brave and generous people even in their faults. For, judged from the standpoint of their history, the principles of the *Omertà* Code display a false idea of honor it is true, yet they also show an unquenchable love of justice and

the utmost fearlessness in its pursuit. Their glorious history, the heroic sufferings they have bravely borne from the time of Verres to the bright day when Garibaldi landed at Marsala, attest the sterling character of the Sicilian people. And the very principles of the Mafia if turned to a better purpose and trained in a healthier atmosphere will yield, as Prof. Vaccaro observes, noble civic and military virtues. These we have recently seen displayed at Adowa, where every officer and private of the Sicilian batteries died at his post rather than surrender. And we, who though far more fortunate and far ahead of them in social and economic development, are, nevertheless, spectators in our own country to the excesses of the Whitecaps and of the "nigger hunters" let us learn to be, if not more just to our brethren across the seas, at least more charitable.

A BREACH OF PROMISE CASE.

AT a public entertainment given recently by the Royal Arcanum in St. Louis, one of the features was a trial before a jury of a breach of promise case. Hon. John A. Talty, one of the judges of the Circuit Court of St. Louis, presided at the trial, and gave the following charge to the jury.

MAY BLOSSOM
vs.
JACK FROST. } In the Breach of Promise
Court of the Royal Arcanum.
Case No. 6,747,899.

Gentlemen of the Jury, when the evidence is in,
'Tis said the labors of the court and jury but begin;
And that you the issues herein may well and truly
try,
The Court instructs you, to the facts, what law you
shall apply.
The jurors are instructed, in this suit by plaintiff
brought,
She alleges that defendant with her feelings havoc
wrought,
In this, that though he very often begged her him
to wed,

She said him nay by shaking her gorgeous blondined
head;

'Till he became insistent and made promises so fair,
That she finally consented his lot through life to
share;

That all went well until the date fixed for their mar-
riage came,

But his manner has been since then quite as frigid
as his name;

That though she's willing to perform the contract on
her part,

He refuses, and thereby has lacerated her young
heart,

She therefore asks the law for this alleged most
grievous harm

To lay upon defendant Frost its strong majestic arm.

Now, you are instructed, gentlemen, if you find and
believe,

From the testimony offered as each tried their side
to weave,

That on December sixteenth, eighteen hundred
ninety-nine,

Defendant told the plaintiff she alone for him did
shine,

And begged that they betrothed be ere from her
side he went,

And she finally consented, though she'd said she'd
ne'er consent;
And if you do find further that defendant has re-
fused
To carry out his contract, he cannot be excused,
And a verdict for the plaintiff 'twill your duty be to
find
That will fairly compensate her according to your
mind
For the damage she has suffered, but in no event for
more
Than one hundred thousand dollars, the amount that
she sues for.
On the other hand, however, if your august body
finds
There was not a complete meeting of both the par-
ties' minds,
She should not receive a verdict, though her smiles
be e'er so sweet,
For the law requires that the minds of both the par-
ties meet.
Therefore if you find he promised not, or even if
he did,
The promise of the plaintiff was a pure and simple
bid
For presents from defendant, so dear to female
hearts,
Also intended by her to aid the witness Swarts,
Why then, 'tis clear the minds of both the parties
never met,
And the law says most emphatically she can't a ver-
dict get.
But though the plaintiff was, as claimed by counsel
from his seat,
Engaged to wed five others, this alone should not
defeat
Her, but consider it when argument is done,
In determining if her promise was a bona fide one.
And with the next alleged defense, that when their
lips did meet
The painter's art made plaintiff's kiss taste anything
but sweet,
'Tis quite unnecessary for you any time to waste,
So clearly it appears the matter's simply one of
taste.

Then, by charging he was hypnotized, he seeks her
claim to meet,
But a "rose by any other name," you know, "would
smell as sweet,"
For we're satisfied, you'll say 'twas love—you all
have felt its dart,
Defined in dictionaries, "an affection of the heart."
The diamond that he asks for, in this case you can-
not reach,
The only question being, did he promise, did he
breach?
The court instructs you further, as the lawyers who
speak last
May contend there was no contract, no considera-
tion passed,
That marriage makes the rights of parties different
per se,
Not only to each other, but the whole community.
A consideration better 'twould be difficult to find
Than a promise of marriage, we can call none now
to mind.
So that if one promises to wed, the court would
have you know,
That the promise of the other is a legal quid pro
quo.
You're to decide the issues on the evidence in the
case
And not be swerved by counsels' speech or plain-
tiff's pretty face.
We trust this admonition will not be made in vain,
For that you admire her beauty, to the court is very
plain.
Discharge your duty faithfully and fearlessly as
well,
Then your children and your neighbors will with
pride the story tell,
Deal out even-handed justice, as you jurors see the
right,
And if you find for plaintiff do not make your ver-
dict light,
But let it be substantial, that will make defendant
wince,
If for defendant, tell him, without day he shall go
hence.



LEAVES FROM AN ENGLISH SOLICITOR'S NOTE BOOK.

VII.

BLUE WINS THE DAY. A STORY OF AN OLD TIME ELECTION IN ENGLAND.

BY BAXTER BORRET.

WITH the passing of the Ballot Act, and the Corrupt Practices at Elections Act (the latter a vigorous measure carried through the House of Commons by the indomitable energy of Sir Henry James, now Lord James of Hereford), bribery at Parliamentary elections has been practically extinguished. Under the working of the ballot the most astute election agent can never be certain whether the promises made to him before the election have been kept by voters; and under Lord James's act bribery has become, to say the least of it, highly dangerous to all the parties directly, or even indirectly, concerned; the seat won by an entirely innocent candidate may later on be declared vacant through the act of some amateur electioneer with more zeal than discretion, one, for instance, who, for the sake of the good cause, at his own expense hires a carriage to convey an invalid voter to the poll to record his vote; such an act comes within the definition of a "corrupt practice," and jeopardizes the seat won by a candidate who has done his best to fight the election on the strictest lines of purity. Another bar to the practice of wholesale bribery was created when the last act providing for the redistribution of electoral districts was passed; since which time the number of voters in each district has been so enormously increased that the longest purse cannot afford the strain of wholesale bribing.

I may say with some degree of confidence, therefore, that something very nearly approaching to absolute purity of election has been at last established throughout the length and breadth of the electoral districts of Great Britain. Of Ireland I cannot speak from per-

sonal knowledge, but there is an impression in England that the most potent factor at Irish elections is the spiritual influence of the Roman Catholic priest over the votes of the ignorant and ill educated, but no act of Parliament can reach this evil.

Things were very different when I first joined the legal profession; perhaps an account of my first and only experience of electioneering under the old system may interest, and possibly amuse, the readers of the *Green Bag*.

Early in the sixties a Parliamentary election was pending in the little borough of Rottenton, on the eastern coast of England, and a close fight was expected. Rottenton was an old-fashioned borough which, somehow or other, had escaped being swept off the board at the time of the passing of the first reform bill; the constituency was a small one, the voters did not number 500 all told. The fate of an election usually depended on the votes of some twenty-five or thirty 'long-shoremen, who picked up their livelihood along the little wharf of the town, and who were, by right of some ancient charter, free-men of the town and entitled to vote.

The oracle of the town at election times was a small, wooden-legged man named Briggs, who combined the trade of tobacconist with the profession (as he called it) of barber; his shop was the center of political life at those times, and an election agent who knew his work knew that to secure Briggs was the way to win the election. The 'long-shoremen habitually resorted to Briggs's shop first of all for a matter of daily want, tobacco; secondly, not so necessary for their comfort, for a shave and clean up; at election times

an agent who knew his work would stimulate the trade and custom of the little shop by sending in two, or it might be three, casks of beer, and a judicious quantity of rum, so that customers who came to argue with Briggs on the merits of the rival candidates need not necessarily dry up over their discussion, until such time as the eloquence of Briggs had melted their hearts and the liquor had softened their brains to the point of promising to follow the lead of Briggs when the polling day arrived.

A few years before my story opens, an election was pending in Rottenton. Briggs had recently fallen down and injured his leg, and the local surgeon deemed amputation necessary. A friend of mine, named Mac Price, who had some little property in the town, but who lived in London and was a very popular member of the Stock Exchange, heard of Briggs's trouble from a sister who lived at Rottenton, and, knowing personally the Conservative candidate at the then pending election, with great good feeling got admission for Briggs at one of the London hospitals, where his leg was skilfully amputated; he also gave a small and select dinner party at his own house to certain members of the Stock Exchange ardently attached to the Conservative cause, who got together a liberal subscription to buy Briggs a wooden leg of the most approved mechanical construction; and last, but not least, a donkey, whose office and duty it was to carry Briggs about to the houses of his many customers who preferred being shaved at their own homes; I rather think that the sum subscribed for the purchase of the wooden leg and donkey amounted to something about £150, which left a substantial sum in Briggs's hands. This act of Christian charity, evolved from motives of the purest philanthropy, was followed up by a personal visit to Briggs in the hospital, with the immediate result that he was deeply impressed with the truth of all the leading tenets of the Conservative creed, and two days before the election he arrived

back again at Rottenton, safe and sound in mind and limb, save for the now missing leg, and a vigorous evangelist among his brethren of the doctrines of saving conservatism. The 'longshoremen flocked to his shop to be shaved, and to learn the wholesome doctrines propounded by the converted neophyte, and the election was carried in the teeth of the enemy by a triumphant majority of thirteen votes.

But now, just before my story commences, the Conservative member had joined the overwhelming majority in the land of shadows; the Conservative party had no man of local influence to put forward, and had been compelled to adopt as their candidate a stranger hailing from London, but unknown in the little borough, and his candidature was being vigorously opposed by a local magnate, who had made money in the place, and owned nearly half of the small houses and shops, and more than half of the public houses in the town, and the chances of the Conservative candidate were by no means bright. Briggs, too, had fallen into the rear rank; his little shop was owned by the local magnate, he was a year in arrears with his rent, and the local magnate had intimated, in unmistakable language, that if it should so happen that the Conservative candidate should be returned at the head of the poll, the bailiff would take possession of Briggs's shop the morning after the election, and sell him up, stock and all, and turn him out into the street. In vain Briggs begged for mercy, pleaded extreme poverty, and (saddest of all) the recent demise of his beloved donkey and the consequent loss of a considerable portion of his trade and custom in the outlying districts; his last plea was met by the offer of the temporary loan of another quadruped of the same class, conditionally on its being decorated with the yellow colors of the Liberal cause while perambulating the streets of the borough; the return of the animal to its right owner being made dependent on the return of the Conservative candidate to Parliament at the close of the poll—a very pretty elec-

tioneeering dodge which had to be met with a counter-stroke of electioneeering genius. At this time Mr. Mac Price was laid by the heels in London with a severe attack of gout, unable even to give a little dinner party, much less to travel down to Rottenton, but his interest in the fate of the pending election was unabated, and, as I was then an equally keen politician in the same cause, he despatched me down privately to confer with the election agent of the Conservative candidate on the state of affairs. I learned from the agent that the contest promised to be a close one, especially as he could by no means rely on the votes of the 'longshoremen, who had lost confidence in Briggs as their oracle, now that fortune had deserted him, but the agent thought that if he (Briggs) could only regain his old ascendancy and work their votes, as no one but he could do, all would be well. I told him I thought the 'longshore votes could be counted on, and that he need not waste his energies upon them, but devote his talents to securing the votes of the leading tradesmen, principally the publicans, leaving the 'longshoremen to be reached by other influences, as to which, in the interests of "purity of election," he had better not be too inquisitive. I then betook myself to the little shop tenanted by Briggs, who did not know me, though I easily recognized him by reason of his defective understanding. I requested the luxury of a shave at his experienced hands, and, when the little shaving parlor was empty, I confided to him that his old friend, Mac Price had sent me down specially to inquire into the state of his health and that of his donkey, and whether the mechanical leg fully answered all his anticipations. These few words of introduction made him turn several colors, but not yellow, and he poured forth the full tide of his troubles. Of course, my own heart was deeply moved with the tale of his woes, and by his threatened apostacy from the true blue creed; however, I thought I discerned signs of wavering about him, and hoped that a spark of the true faith still remained capa-

ble of being blown into a bright flame by the use of the right means. I intimated, of course, that it was out of my power to make any definite promise, but that I could not help thinking that the same kind of providence which had provided a wooden leg, and a real live donkey, in the time of his former trouble, might send him help in his new distress; that I knew there were still wealthy members of the London Stock Exchange who only longed to discover such cases as his for making a good use of the riches which a good Providence rained upon them, and that it was a pity for him to desert the true blue principles of his former creed merely because a much loved donkey had been called (prematurely, it might be), to his long earned rest; that though there was, so far as I knew, no recorded instance of a donkey having been actually raised from the dead, yet they were a class of animals who were continually propagating fresh specimens of their own species, which were at all times procurable in the open markets of commerce, and that a beneficent Providence might possibly in the days of darkness open the hearts of good men to procure from one of those markets a younger and more vigorous animal better qualified than his lamented predecessor to bear the weight of so doughty a champion of the true blue cause for many years to come; that as to the rent, he must remember that one of the characteristics of true charity was that it never faileth. I pointed out, also, that in the meantime it was only due to the local gentleman who had so opportunely come forward with the temporary loan of the other animal, that he should use that animal in prosecuting his master's service by securing the votes of all the 'longshoremen, to be available at his (Brigg's) disposal on the polling day, which would be the more easily secured if the owner of the animal would also supply for their refreshment the usual modest allowance of beer and rum to which they, as voters, had been accustomed on previous occasions, and that, after the election,

if the Conservative candidate should be returned, the supply of beer and rum, to drink long life and success to the new M. P., might be expected to be continued, and would, I was sure, taste much better than any paid for out of a yellow purse.

I promised to report to Mr. Mac Price on the state of his health and on the lamented demise of the deceased quadruped, and to meet Briggs with further news the day preceding the polling day. It is expedient in electioneering always to adopt veiled language; words may be overheard, but a significant pressure of the hand is a token which will be felt though unheard.

And so I left Rottenton, satisfied with the impression I had left on the oracular mind of the wooden-legged tobacconist and barber. And Briggs and the loaned donkey still continued to parade the streets of Rottenton, decked in the yellow colors of the party to which that wise quadruped still adhered, and the 'longshoremen were interviewed by Briggs and shaved at the expense of the local magnate, and quenched their thirst for political principles at the inexhaustible oracle of Briggs, while the other and less easily exhaustible thirst for beer and rum was also mitigated at the local magnate's expense up to the day preceding the polling.

On the afternoon of that day (the day before the polling), I met Briggs by appointment, as also a goodly number of the 'longshoremen, at an inn some three miles out of the town. Our interview was short, sharp and decisive. I need not put on record all that passed, but before we parted I knew that the Conservative candidate could depend upon the twenty-five 'longshore votes, which would suffice to turn the election. Neither the candidate himself, nor his agent, knew anything of my operations, and no question of implied agency before or after the election could by any possibility be made out against them as concerned anything I did. It was philanthropy pure and simple, and such could not be said of the

loan of the donkey and the supply of drinks by the accredited agent of the spoiled Egyptians.

I ought to mention that an old pensioner of the family of my friend Mac Price lived in the borough in the person of an old man named Joe Castor, who had in his best days been the irresistibly comic clown of a traveling circus, and who had met with an untoward accident in the height of his career which rendered him a partial cripple. He, too, was a voter; for him, too, a timely subscription had been raised by Mac Price's free-handed friends to tide him over the wants of old age; and he, too, was a devoted adherent to the principles of true blue faith. Poor old fellow; he had grown in his later years morbidly melancholy, and it was only now and then, when the rare chance of passing off some recondite joke of old days presented itself beyond the powers of resistance, that his long visage melted into a smile; then his hilarity was almost pitiable to see. He retained one accomplishment to the last, he was an inimitable ventriloquist. On the afternoon of the day before the polling day I called upon him and pressed him into the service of the good cause.

One act of justice remained to be done, and I gave the doing of it into the hands of the long-visaged Joe Castor. About midnight a prolonged hee haw awoke the echoes of the front garden of the domicile of the local magnate, and a pealing ring of the front door bell startled the inmates of that secluded mansion. A company of admiring friends were sitting around his hospitable board, drinking deeply to his success at the poll on the morrow, the local minister of his religion was extolling his virtues in turgid oratorical periods, invoking the confusion of heaven on the accursed Conservative creed, which stifled all freedom of religious belief, etc., when his oratory was rudely interrupted by the prolonged "hee haw" and pealing ring of the front door bell above referred to. On the assembled company rushing to the door

no person was visible to eyes which could not penetrate the shadows of the shrubs which sheltered the corners of the well-kept lawn, otherwise Joe Castor's place of concealment might have been violated. The only object which met the view of the belated guests was the form of the loaned donkey, decked out in its gay trappings of much soiled yellow, tethered to a stake stuck into the very center of an ornamental bed of choice parti-colored geraniums, off which the misguided beast was making a hasty but hearty supper; the night was dark, the air was still, no sound was audible till the enraged local magnate approached the returned prodigal, then, and only then, as the beast lifted its head in meek reproach an unearthly voice was heard to issue from his jaws as he munched a fragment of his stolen supper: "Briggs has sent me back again; he is not such an ass as I am." After that, silence again reigned, broken only by an exclamation from the local minister: "Well, since the days of Balaam, such a thing has not been known," and a profound, long-sustained big D— burst from the irate lips of the local magnate. Old Joe Castor had played his little joke admirably, his heart was in it, and he did not, in the safe seclusion of the shrubs, miss the rounds of applause which this exhibition of his powers would, under brighter circumstances, have called forth.

The dawn of the polling day disclosed a lively scene. A bevy of 'longshoremen hurrying in and out of Briggs's shop, to whom Briggs inside was paying devoted attention, shaving them as neatly as deft hand and keen razor could accomplish their purpose, while at the door of the well-known shop stood a picture of beauty, the cynosure of all eyes, a most daintily groomed donkey, youthful in

appearance, gorgeously caparisoned in the blue colors of the Conservative cause. And when the poll opened the first vote recorded was that of Briggs, who dismounted from his gallant steed and polled true blue according to his faith and his colors, followed by the twenty-five votes of twenty-five sturdy 'longshoremen, all true and independent electors of the enlightened borough of Rottenton, and all, to a man, polling true blue. "Nothing succeeds like success," "Well begun is half won." Voters dearly love to be on the winning side; before noon many doubtful voters attached themselves to the winning colors. And, when the poll closed at four o'clock, a shout of triumph went up from the headquarters of the Conservative candidate as the mayor announced him to be returned by a clear majority of thirty-five votes. And no one, not even the Conservative candidate or his authorized agent, knew where the gaudily caparisoned quadruped came from, or whose were the fair hands that worked the rosettes for his adornment, or who was the charming young lady, closely veiled, who left at the local magnate's house that mysterious envelope containing in notes and newly-coined silver the exact amount of Briggs's overdue rent; (there were always deep mysteries about elections in the old days). I knew; I was not married in those days, and the young lady was not then, as she became soon after, my accredited agent in the eyes of the law.

This was my first, my only, experience of the methods of working elections in England before the good old days were stamped out by the stern foot of Lord James of Hereford and his Corrupt Practices Act.

A MASTERPIECE OF CONSTITUTIONAL FOLLY.

BY A. M. BARNES.

IT is doubtful if, since the world began, there has been a product of the combined brains of philosopher and statesman that contained within itself so much of arrant nonsense, of pure folly, as the Grand Model of Locke and Shaftesbury, better known as the Fundamental Constitutions of the Province of Carolina. Yet it formulated a most elaborate scheme of government, one that had for its object the reign of aristocracy in a colony of adventurers, "in the wild woods among savages and wild beasts."

This wonderful document was a very pretty instrument, that is as to its visionary conceptions in their elaborate dressing of words. This fascinating brain child of administrative temperament first saw the light at Exeter House, the home of Lord Ashley, afterward Earl of Shaftesbury, March, 1669. John Locke, then but at the dawning of his fame, was not only the private secretary of my Lord, but also his close friend and adviser. Lord Ashley had great admiration for the brain force of the budding philosopher. The document is said by some to be a collaboration; by others it is claimed as the entire work of Locke. The former opinion is more generally accepted, since there are certain terms and expressions in the Grand Model that have a highly perceptible flavor of Parliament.

We are told that when this wonderful instrument, containing its beautiful elaboration of laws for the governing of bold freemen and wild Indians in the forests of the new world, was shown to the proprietors they, "with some modifications," — only slight ones, however — "solemnly adopted it." This was in July of 1669. On October 21 of that year the same solemn assembly, with but one or two exceptions, met to organize the highest judiciary under the new

form of government, the Palatine Court. The Grand Model was then declared in effect — the high-sounding array of laws written for the upholding of the aristocracy and the demoralization of the real bone and sinew of the country, the plain people.

First of all this remarkable document declared that the two principal objects it had in view were "the pleasing" of "Our Sovereign Lord the King;" who out of "his royal grace and bounty," has "bestowed upon us," etc., and the "establishing of the interests of the Lords Proprietors." Not a clause, not one word was there with reference to any rights and privileges of the people. In short, it was to be a government in which the commonalty, the lower herd, had neither part nor parcel, were simply "not in it," to use an expression of slang. It is no wonder that it became its own accuser from the very beginning of its enforcement, arousing in the breast of freemen the first mutterings of that storm which later broke with such force over the heads of the Lords Proprietors, leaving devastation in its track. Happy it was for the country that that same will of the people, the spirit of free and equal rights to all, could build above the wreckage the structure of better government.

Under the rulings of the Grand Model the Province was constituted a County Palatine, the political head of which was known as the Palatine. The clause of the constitution containing this provided that the oldest of the Lords Proprietors should become Palatine, and that upon his death the next in line of age should succeed him. He, together with the other Proprietors, constituted the Palatine Court. This body possessed vice-regal power, corresponding to that of the King in his monarchy. Only his authority was superior to theirs. In other words it

held supreme control of the rights and privileges of its American subjects, and only the King could interfere therein.

In addition to the Palatine there were seven other chief officers, Admiral, Chamberlain, Chancellor, Constable, Chief Justice, High Steward, and Treasurer. Including the Palatine Court provision was made for eight Supreme Courts, each taking its name from a chief officer named above.

The Chancellor's Court held control of all matters of State, the direction of Indian affairs, and the supervision of printing. The Chief Justice's Court had jurisdiction over appeals, both civic and criminal, except such as came under the jurisdiction of the other Proprietors' Courts. The Constable's Court was an embryo War Department, since it had the ordering of military affairs and the supervision of arms, ammunition, etc. The Admiral's Court, or, in other words, the Court of Admiralty, had the power of appointing judges for port towns, as well as the administration of affairs concerning the commerce of the seas, the seizure of vessels, and the like. The Treasurer's Court had full control of the direction of all matters concerning the public revenues. The High Steward was a kind of general utility man, for he had charge of all matters pertaining to floods, drainage, sewers, public buildings, highways, bridges, the surveying of lands, and the care of foreign trade. The Chamberlain was a man of ceremony. He had direction of public assemblies, of the reception of messengers, the keeping of pedigrees, the registration of births, marriages, and deaths, as well as "the regulating of all fashions, habits, badges, sports," etc.

In addition to these courts there was to be a Grand Council, to consist of the Palatine, the seven Proprietors, and forty-two counsellors selected from the different Proprietors' Courts. In this council was invested the power to settle all controversies arising between the various Proprietors' Courts as to their respective jurisdictions. This body

also had the preparation of matters for presentation to Parliament, and no matter was allowed to go up to Parliament from the Province that did not first pass through the hands of this Grand Council. The Palatine and each Proprietor was allowed a deputy to represent him in the council. Thus the Proprietors had dual power of supremacy, through the Palatine Court in England and the Grand Council in the Province.

Provision was made for County and Precinct Courts for the trial of "small causes," civic and criminal. In order to try cases of treason, murder, and the like, a commission was granted twice a year to one or more members of the Grand Council who came as judge to county or precinct, and, together with sheriff and four justices, constituted the Court of Assizes. From this court the plaintiff could appeal to the Court of the Proprietors within the jurisdiction of which his particular case lay, but not until he had paid £50 sterling "for the use of the Lords Proprietors."

The rules governing jurymen were exceedingly crude and altogether unsatisfactory. Then, as now, twelve constituted the jury, but to reach a verdict it was not necessary that all should agree. Seven could carry the day against five if they so decided.

There was no provision whatever in this wonderful piece of patchwork laws for counsellors-at-law. Indeed, the Grand Model made it an offense for any save a near kinsman "to plead another's cause" until he had first, in open court, made oath that he was not to receive money or reward of any kind. True to its conception and its purposes it had for its one tenor "patrician privileges." He who could plead before a court must not do so for money. The ignorant could not, neither could he employ counsel. The immense influence this gave the governing class in the dispensation of the laws can readily be seen.

Every two years there was to be a Parliament held in the Province, to consist of

the Proprietors or their deputies, the Landgraves and Caciques, and one freeholder from each precinct to be elected by the other freeholders. Here again rank injustice to the commonalty came in, since they were in so sad a minority they could gain no control of any question. In short, they were "mere witnesses" to the actions of others, lookers-on in proceedings in which they had no real part or parcel. As a kind of honeyed concession it was agreed that all members of this Parliament, patrician or plebeian, should sit together in one room, an arrangement modeled after the usage of the old Scotch Parliament. But, even had it been allowed the commons to have voice in the proceedings of the Parliament, it would have been merely farcical, since, according to the rulings of the Grand Model, "no business should be allowed to be proposed" to this Parliament until it had first been debated in the Grand Council. Besides, like the Scotch Lords of Articles, they alone had the privilege to prepare bills for presentment to the English Parliament.

One marvelous provision of this remarkable Model was with reference to the registration of births, which declared that the time of each one's age must be reckoned "from the day his birth is entered in the registry, *and not before*." No marriage was legal till both parties owned to it; neither could administration on an estate take place until the death of the testator was registered. Failure to register a birth or a death subjected the person in whose house it occurred to a fine of one shilling a week.

There were three orders of the nobility, Palatines, Landgraves, and Caciques. The term Palatines — literally Lord of the Palace — was borrowed from England, that of Landgrave from the Germans, and Cacique from the style of the Indian chiefs in America. Each Landgrave was given four baronies, and each Cacique two. There were to be as many Landgraves as counties, and twice as many Caciques. The land apportioned

to each Landgrave was 48,000 acres, and to each Cacique 24,000. The counties were laid off so that each contained 480,000 acres or 750 square miles. In addition to the seignior of the Proprietors, the barony of the nobility, and the portion allotted to the common people, there was another subdivision, that of the manor. Each of these divisions consisted of from 3,000 to 12,000 acres. The Lord of the Manor within his domains had all the "powers, jurisdictions, and privileges" that pertained to the Landgraves and Caciques. As to the land grants to the commons, these, like all their other privileges (?) under the Grand Model, "depended." In the order for the keeping of a copy of the "constitutions" in a great book, by the register of every precinct, it was expressly set forth that "no person of what degree and condition soever, above seventeen years of age, should have any estate or possession in Carolina, or protection of the law, who did not first pledge to defend and maintain them."

It is no wonder that the opposition of the people to the Grand Model and its methods became so violent that my Lords were forced at last to pay heed to it. On May 10, 1682, another set of the "constitutions" was formulated, in which, and to which, the Proprietors claimed they had made some valuable alterations and additions. But these were really of little moment. The most important was that with reference to the Grand Council, which provided that should that autocratic body forget its duty at any time, and not propose to Parliament laws of benefit to the people, the grand jury of the county could take the matter in hand; and, if the Grand Council did not, within reasonable time, make the presentment, the matter could be acted upon without their consent.

Still the people were not appeased. As to any real rights and privileges for themselves the Grand Model was as barren as ever; the "constitutions" as much of a farce as they had ever been. The whole colony

was in a state of ferment. An uprising might take place at any moment. On the 12th of March a third set of the fundamental constitutions was presented to the inhabitants of the Province, thirty-eight articles in all, which, it was declared, took the place of all "former instructions and laws." But instead of lessening the dissatisfaction of the people, they increased it. An open conflict was imminent. On the one hand was the pride and interests of the Proprietors, and on the other the rights and privileges of the people as they claimed them under the text of the charter. In making their own sets of laws, which sought to evade all provision that secured to freemen the right to participate in the government of the Province, the Proprietors had not only wilfully disregarded the very spirit of the charter, but they had also proceeded in direct violation to its rulings, which declared that no laws could be made and enacted except "by and with the advice, consent, and approval of the freemen of the Province."

The spirit of long suffering had reached its limit; endurance was no longer a virtue. The representatives of the people in the Parliament absolutely refused to accept the third set of the "constitutions," though again some modification had been made. A succession of stormy scenes ensued, among the stormiest in the history of the Province. The end was that the peoples' representatives were expelled from the Parliament. The

conflict was on in earnest. The people had taken their heads from the yoke; they would never put them back again. The Proprietors had now to face the situation, to pay heed to the demand of the people for a form of constitutional government in accordance with their rights under the charter. As usual they dallied. An outbreak took place. The people seized and imprisoned Paul Gimbrall, the Secretary of the Colony, and took possession of all public records. The whole Province was thrown into a state of revolution.

The Proprietors promised satisfaction. Various remedies were proposed. Sets of laws were drafted and presented, and as persistently rejected. Through the next twelve years the Proprietors clung lovingly to the various remnants of the old Model, inserting them into the patchwork of the new, but were forced in the end to abandon the very last shred of the "grand" pattern, and to instruct the governor of the Province to make provision for the framing of a system of government "suitable to the charter," to take the place of "the excellent system of Locke." They died game, in their pride at least.

It took thirty years for "the Model" to run its course. Considering the temper of the freemen of the Colony and the fact that "the laws" were never constitutionally of force, the mystery is that it ever held together so long as it did.



LONDON LEGAL LETTER.

LONDON, May 5, 1900.

THE legal and the lay world has been a good deal exercised during the past month by certain unpleasant disclosures of the financial condition of various well known and heretofore highly respected firms of solicitors. It is only a few weeks since the head of a firm in the very first rank of the profession committed suicide and his partners found themselves in the bankruptcy court with liabilities of over a million dollars and assets of a few thousand. Within the past few days another Lincolns Inn Field solicitor, whose word was popularly supposed to be as good as a Bank of England note, was sentenced to six months' hard labor for obtaining by false pretence the property of a client.

It must be difficult for an American to realize how any firm of lawyers can fail for a million dollars, and yet there are probably three or four hundred firms of solicitors in London who have in their possession, or absolute control and disposition, funds or securities or documents representing many times this amount. In England it is considered as necessary for a family to have its solicitor as in America it is for a man to have his doctor and his dentist. The firms of solicitors practically exist in perpetuity. When one of its members dies his son takes his place, or his personal representative sells his share in the business to a new partner. Thus the firm goes on for generations. In like manner the client from father to son entrust their affairs to the family lawyers. They make the marriage settlements, take care of the title deeds to all property, find investments and change them as they like, and do everything that a man not accustomed to affairs would like to be saved the bother of. From time to time the client, when he visits his solicitor's office sees among the rows of tin boxes ranged on shelves around the strong-

room, one or more bearing his name, and he feels a satisfaction in knowing that therein are deposited his securities and title deeds and mortgages. If he should be asked to look into the box and examine its contents he would probably resent the suggestion as one involving too much trouble or, possibly, as casting an imputation upon the good old solicitors who have faithfully served him and his ancestors for generations. He therefore neglects to make such investigations as would render any defalcation impossible. In the case where the recent disclosures have been made the solicitors relied upon the faith reposed in them by their clients, speculated with the funds and securities in their hands, paying their too credulous clients the regular remittances of interest they had been in the habit of receiving, and then when the crash came some one of the members of the firm was made the scapegoat and nothing was left for him but suicide or a bolt to some remote part of the globe. Now after an epidemic of such failures it is rumored that yet another great firm, with a large number of good families' affairs in its office, is in such straits that a scandal of greater proportions than its predecessors, sensational as some of them have been, is on the verge of disclosure.

The subject is receiving the anxious attention of the Incorporated Law Society, which disciplines and regulates the affairs of the solicitor branch of the legal profession. The president of the society has stated that these cases of dishonesty, which are so obviously on the increase, "are calculated to produce a feeling of humility in the profession," and a committee has been appointed "to inquire into the best means of protecting the profession and the public from such malpractices as have been disclosed in recent cases." The committee will consist of twelve members among whom are Sir George Lewis, the Hon. Charles Russell (a son of the Lord

Chief Justice) and Mr. B. R. Heator, who is the solicitor of the executors in London of the estate of the late Mr. Augustin Daly. What they will recommend or how absolute security can be attained so long as credulous clients refuse to take any responsibility upon themselves for the safety of their fortunes, remains to be seen. The American system of making trust companies administrators and guardians and trustees is practically unknown here, and no trustee or fiduciary agent of that character is privileged to take or is allowed a commission for handling the affairs of an estate. It would seem wiser to allow responsible agents a commission than for dishonest solicitors to take the principal.

No little excitement has been created by the recent divorce and remarriage of Earl Russell in Nevada. It is to be hoped, in the interest of common decency, that proceedings will be instituted in this country to determine the worthlessness of these western states' divorce decrees. They can only be obtained by frauds upon the court of so palpable a nature that the merest tyro in the law ought to be able to detect them, and yet the judge of the District Court of Nevada in which Earl Russell obtained his decree is presumably not a tyro. Earl Russell is a peer of the English realm. He went to Nevada, bought a tract of land and almost forthwith, instituted proceedings for divorce from the Countess Russell, on the ground of her desertion of him. For years he had been in the divorce courts here defending or prosecuting actions relating to his domestic status. The last of these was a *cause célèbre* in the House of the Lords which was decided less than three years ago. It was an action brought by the Countess for restitution of conjugal rights and there was a counter demand for judicial separation on the ground of cruelty. This is reported in 1897, Appeal Cases, 395. In the face of these facts the judge considers an English earl to be a *bona fide* resident of Nevada, who is ignorant of his wife's address (for the service

upon her was by publication), and upon his uncorroborated evidence grants him a decree of divorce. Needless to say that the Earl, within forty-eight hours, delaying only long enough to marry the lady who was his intimate friend in England and who by an odd coincidence obtained at the same term of the same court a decree against her husband, returned to England to resume his life here and his duties in the House of the Lords. Such juggling with justice ought to be resisted with the same condemnation in the United States that it receives in this country. Criminal proceedings for bigamy against the Earl are talked of, but it is doubtful if that conviction would result, as the defence would probably be that the accused was advised by counsel learned in the law that such a divorce as he afterwards obtained in America was a good divorce, and that his marriage being valid in Nevada was valid everywhere, or in other words that whatever he did was done in good faith and after counsels' advice.

The Bar Council, in its recently issued annual report, refused to approve the suggestion of a shortening of the very long summer holidays which are now imposed upon all barristers. The courts now close on the 12th of August, and do not reopen until the 29th of October. During this long period of nearly eleven weeks the busy, as well as the briefless lawyer must idle, whether they like it or not. At the annual meeting of the Bar last week, a resolution to alter the date and term of the vacation from the 12th to the 1st of August, was carried by a large majority. But an amendment to reduce the vacation by making it end on September 30, which was warmly supported by Sir Edward Clarke, was rejected. It was argued that the English Courts sat only 115 days in the whole year, and that if the amendment was carried the Bar would still have a vacation of eight weeks and five days—longer than that enjoyed by the legal profession in any other country. Sir Edward Clarke expressed

the opinion that the legal vacation was much too long, that it was no real advantage to any man in the profession, that it was a serious hindrance to public business, and a serious interference with the work of the courts.

These are views undoubtedly those of a large majority of the bar, but it is difficult to carry any reform which is opposed by a well-disciplined minority.

STUFF GOWN.



The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae anecdotes, etc.

FACETIÆ.

LORD RUSSELL of Killowen (when Sir Charles Russell) was once examining a witness. The question was as to the size of certain hoof prints left by a horse in sandy soil.

"How large were the prints?" asked the learned counsel. "Were they as large as my hand?" holding up his hand for the witness to see.

"Oh, no," said the witness honestly; "it was just an ordinary hoof."

Then Sir Charles had to suspend the examination while everybody laughed.

"WHAT'S the charge in this case?" asked the magistrate.

"That's what I'm waiting to find out, your honor," replied the prisoner. I had the satisfaction of hitting him, and I'm willing to pay any price that's in reason.

HON. J. J. INGALLS in The Saturday Evening Post tells the following good stories of Wm. M. Evarts:

Among the guests at a dinner to Daniel Webster in New York was Dr. Benjamin Brandreth, the inventor of a celebrated pill known by his name. Mr. Evarts united these two great men in a volunteer toast to "Daniel Webster and Benjamin Brandreth: the pillars of the Constitution!"

Objections had been filed with the Judiciary Committee to the confirmation of a nomination on account of the dissolute habits of the appointee.

When the case came up for consideration the chairman called for the affidavits. The clerk produced a number from the files. Consulting his docket, Mr. Edmunds thought there were

more, and others were found. A search disclosed another batch that had been overlooked.

"The papers in this case," said Mr. Evarts, "appear to be more dissipated, if possible, than the candidate!"

To a lady who expressed surprise that one of such slender frame and fragile physique could endure so many feasts with their varying viands and different wines, he replied that it was not so much the different wines that gave him trouble as the indifferent ones.

President Hayes was a total abstainer—at home. Scoffers said he only drank the "O. P. brands." His state dinners, otherwise very elegant and costly, were served without wines. The only concession to conviviality was the Roman punch, flavored with Jamaica rum. Evarts was accustomed to allude to this course as "the life-saving station!"

Rising to address informally the guests at a Thanksgiving dinner, he began: "You have been giving your attention to a turkey stuffed with sage. You are now about to consider a sage stuffed with turkey."

COUNSEL. "What do you know of the defendant's reputation for veracity?"

WITNESS. "Well, if Ananias had lived in his neighborhood he'd never have become celebrated."

NOTES.

SOME years since in Louisa County, Iowa, a person was caught stealing timber from the government lands. A young reader of Blackstone was appointed to defend. It was agreed by the state and by the court that anyone guilty of the same charge would be a prejudiced person to sit on the jury. Two days were occupied in trying to get a jury for all those summoned had been guilty of the same charge. At the end of that time the young lawyer made a motion to dismiss for reason that in a community where

everyone stole government timber it could not be a crime within the statute, and he won.

In a suit in the common pleas at Philadelphia, counsel for defendant in his argument before the jury said, "And now, gentlemen of the jury, if further proof were needed of the lack of good faith of the plaintiff, it can be found in this document in the very handwriting of the plaintiff and admittedly signed by him. I hold it up so that you may all see the signature of the plaintiff, even to the last man in the box." Then casting his eyes at the twelfth juror counsel noticed that he was asleep. Unable to resist the impulse to be witty, he added, "if he were awake." The laughter of his fellow jurors woke the sleeper and his confusion was very great. But the confusion of the witty lawyer was greater when he discovered that the sleepy juror had argued so strongly against his client in the jury room that the verdict was for the plaintiff.

SIR WALTER SCOTT had his share of curious experiences at the bar. His first appearance as counsel in a criminal court was at Jedburgh Circuit Court (Assizes) in 1793, when he successfully defended a veteran poacher. "You're a lucky scoundrel," Scott whispered to his client when the verdict was given. "I'm just o' your mind," returned the latter, "and I'll send you a maukin (i.e. a hare) the morn man." Lockhart, who narrates the incident, omits to add whether the "maukin" duly reached Scott, but no doubt it did.

HERE is a judicial Egyptian maxim which is known to have been avowedly acted on: "Strike the innocent, that the guilty may confess," i.e. out of compassion.

A FEW months ago two miserly women, mother and daughter, were murdered in Berlin. The murderer is still missing. The mother had willed her very considerable fortune to her daughter. The daughter had excluded her mother and all her relations, appointing no heir. This makes the state heir. The poor relations, however, protest, as there is no proof that the mother died first. The only person who could solve this knotty question is Göuczy, the murderer, and he has private reasons of his own for keeping in the background.

INTERESTING GLEANINGS.

PAYTA, in Peru, about five degrees south of the equator, has the reputation, according to Professor D. G. Fairchild, of being the driest spot on the globe. On an average, a shower of rain occurs at Payta only once in two years. But the interval between showers is often much longer. In February last, when Professor Fairchild visited the place, the first rain fallen in eight years had just wet the thirsty soil, having lasted from 10 P.M. until the following noon. Yet in that arid climate seven species of annual plants manage to exist, and the natives earn a livelihood by growing a species of cotton whose long roots find moisture in the bed of a dried-up river. This cotton is readily marketed.

THE Great Wall of China was recently measured by Mr. Unthank, an American engineer. His measurements gave the height as eighteen feet. Every few hundred yards there is a tower twenty-five feet high. For 1,300 miles the wall goes over plains and mountains, every foot of the foundation being of solid granite, and the rest of the structure solid masonry.

ALMOST all the towns in Siberia are having arc lights for street use and incandescent lights for houses, and the larger proportion of the people in Siberia have never seen gas, which they regard as an illuminant of a past age.

"IT is a notorious fact," says THE NATIONAL DRUGGIST, "that the pineapple is considered the least healthful of all the edible fruits of the tropics by those who know anything of the matter. . . . The juice of the green and growing plant is accredited in Java, the Philippines, and throughout the far East generally with being a blood poison of a most deadly nature. It is said to be the substance with which the Malays poison their krishes and daggers, and is also accredited with being the 'finger-nail poison' formerly in use among aboriginal Javanese women almost universally. These women formerly (or some thirty odd years ago), and possibly do yet, cultivated one nail, sometimes more, on each hand, to a long sharp point, and the least scratch from one of these was certain death."

PHYSICIANS in South Africa, says a press report, now have another theory for explaining away the charges made by both Briton and Boer that the other is using explosive bullets. The extensive laceration often found in bullet wounds is now said to be due to the air which the bullet drives before it into the wound. "The existence of this phenomenon

can be proved easily. If a round bullet be dropped into a glass of water from the height of a few feet it will be seen that when the bullet touches the bottom a large bubble of air will become detached and rise to the surface. In this case the bubble will usually be from ten to twenty times the size of the bullet. Now, a Mauser bullet traveling at high speed is said to carry before it a bubble of compressed air of large dimensions. Experiments made by a surgeon who fired a pistol ball into a glass of water showed the bubble to be one hundred times the size of the ball. From the appearance of the wounds and from these experiments it is concluded that the mass of air driven by a Mauser bullet explodes in the body of the wounded man with sufficient force to cause extensive laceration. This destructive air bubble is well known to surgeons under the name of projectile air."

LITERARY NOTES.

THE narrative of the Boer War is continued in SCRIBNER'S MAGAZINE for May, with another brilliant article from H. J. Whigham, who reviews the alleged mistakes of the British generals in strategy and tactics, and discusses many much-disputed points in the campaign. In fiction this number contains "Egg Island," a story of a marvelous adventure on a yacht in the southern hemisphere. It is an absorbing tale of a mystery. There is also another O'Connor story, called "Princess Royal," which reveals that delightful Irishman in a most ingenious situation.

AMONG the timelier articles in THE CENTURY for May is an essay by Andrew Carnegie entitled "Popular Illusions About Trusts." The writer contends that the popular welfare is increased by trusts; also, that such aggregations of productive capital are usually short-lived. "The only people who have reason to fear trusts," he says, "are those who trust them." An editorial in the same number entitled "The Real Danger of Trusts," while agreeing with Mr. Carnegie as to the material advantages of such combinations, sets forth wherein they are a menace to the independence of the individual and the state. The sense of humor that gave piquancy to Richard Whiteing's story of social contrasts, "No. 5 John Street," is conspicuous in his treatment of "Parisian Pastimes" this month. In the second and last of his profusely illustrated papers on "The National 'Zoo' at Washington," Ernest Seton-Thompson, author of "The Biography of a Grizzly," dwells particularly on the opportunities such a reservation offers to wild animals to retain

the habits of exercise, etc., on which their happiness and health depend. "A Word of Warning to Young Actresses" is addressed especially to would-be actresses or amateurs who have been dazzled by the glare of the footlights and fancy the stage a royal road to wealth and fame. It is an authoritative word, for it is uttered by one of the most successful of actresses, Miss Clara Morris.

QUITE appropriate to the May number of the NEW LIPPINCOTT, the title of the complete novel, "April Showers," by Alice Brown, author of the delightful "Tiverton Tales." The title fits the story, too, in which clouds and sunshine chase each other in quick succession. Miss Brown is, like Mary E. Wilkins, a New England woman, clever and forcible, and her characters are drawn from the same soil. The difference in treatment of this love story makes the comparison interesting, and we wonder whether Miss Brown has not some time lived where the wind is tempered, and the summers are long, for it seems as if she had been able to retain much of that atmosphere in bleaker Yankee land. S. R. Crockett's story, called "The Troubler of Israel," cannot be excelled in humor and tenderness, and is entirely worthy of the author of "The Stickit Minister."

HENRY D. SEDGWICK, JR., in the May ATLANTIC, under the title "Nations and the Decalogue," treats the habitual insincerity and selfishness of what is called statesmanship among nations, and exposes its weaknesses and wickednesses, believing that nations as organisms have outlived their usefulness, and "lag superfluous" in these latter days. He sees the signs of a coming break-up among the nations, and the amalgamation of them all into one cosmopolitan brotherhood. Under the title, "A Nation in a Hurry," Eliot Gregory contributes a delightfully vivacious satire on the American habit of haste in all things. The paper is a capital specimen of the wit and humor of Mr. Gregory's forthcoming book, "The Ways of Men," and will arouse pleasant anticipations thereof.

IN the REVIEW OF REVIEWS for May there is editorial comment on Admiral Dewey's candidacy, on the government of Puerto Rico under the law recently passed by Congress, on the proposed government of Alaska, and on the developments of the month in financial and industrial circles. Other topics treated in "The Progress of the World" are the rush to Cape Nome, fox breeding in Alaska, the April elections, the epidemic of strikes, the opening of the Paris fair, the military operations in South Africa, and the Delagoa Bay award.

PROFESSOR Fiske has undeniably earned a right to the title of dean of American historical writers. His large and important contribution to American history has received a valuable addition in a history of "The Mississippi Valley in the Civil War." The volume has just been published by Houghton, Mifflin & Co. With the exception of a treatment of the Civil War, such as was necessary for his school history of the United States, the volume marks his first entrance into this important field of historical research and writing. The struggle for the possession of the Mississippi valley was a life and death struggle for the Confederacy, and its history in Mr. Fiske's hands is of the utmost importance and interest.

GOOD BOOKS FOR SUMMER READING.

The quaint old town of Marblehead furnishes the scene of *From Kingdom to Colony*,¹ a charming story of the early days of the Revolution. Mistress Dorothy Devereux, the heroine, is an irresistibly fascinating little creature, and her love affair, which forms the principal theme of the tale, abounds in romance and is touching and tender in the extreme. The story is delightful in every way, and its popularity is evidenced by the fact that it has already passed through its fifth edition.

Although his first essay in novel writing, *Robert Tournay*² demonstrates that Mr. Sage is entitled to be regarded as a prince of story tellers. The scene is laid in France and covers the exciting period of the French Revolution. The story is that of a man of "the people," who loves his aristocratic master's daughter and finally succeeds in winning her love in return though not until after much suffering. The story is full of highly dramatic situations and holds the reader's breathless attention to the end. It is in fact one of the most absorbing narratives we have read for a long time. We understand that it is being dramatized, and it certainly possesses the material for a most effective play.

No better story tellers are to be found than in the ranks of the clergy, and this fact is made fully apparent in *The Parsonage Porch*,³ seven stories from the

note book of a clergyman, by Bradley Gilman just issued by Little, Brown & Co. The stories are capitally told and display much originality on the author's part. They abound in humor, though the element of pathos is not lacking in some of them; but their chief charm lies in the genial personality of the author, and in the humorous and truthful portrayal of the clergyman's point of view. Each story has a short preface which serves to increase the interest in the story to follow, and aids in giving the book unity. It is to be considered as a whole, rather than as the seven ingenious stories, told under the following titles: A Misunderstood Dog; My Old Silk Hat; A Frankenstein Family; Here Endeth the First Lesson; Willis the Dreamer; Wanted—A young Minister; The Rival Undertakers. We have derived genuine enjoyment from the book, and commend it as a most excellent companion for a leisure hour.

Little, Brown & Co. have just published *Tales for Christmas and other Seasons*,¹ by François Coppée, a volume of stories not before translated, now done into English by Myrta Leonora Jones. These stories are among the most dainty, exquisite and artistic of their kind. The author knows how to take a simple, even a commonplace little incident, and so adorn it with literary grace and delicate fancy and sentiment that it becomes "a thing of beauty." Especially noteworthy is the story of "The Lost Child," in which we are shown how M. Jean-Baptiste Godefroi, the wealthy deputy and astute financier, lost his son on Christmas Eve, and found him again sleeping in a hovel. The change of heart wrought in the great M. Godefroi when he found that his boy had been tenderly cared for makes a very human and touching climax to a well-told tale. The other stories are: The Christmas Lovers; A Forgiveness; The Louis d'Or; The Commendable Crime; The Hand-Organ; The Poet and the Courtesan; The Dressing-Maid; The Pillar of the Café; The Little Stationer; Adoption; and a charming introductory sketch of Coppée's grandparents, entitled "An Unwritten Chapter of My Memoirs." A more delightful book for whiling away a rainy day in vacation time it would be difficult to find.

The Empress Octavia,² a book which has created something of a sensation in Germany, has just been

¹ FROM KINGDOM TO COLONY. By Mary Devereux. Little, Brown & Co., Boston, 1900. Cloth, \$1.50.

² ROBERT TOURNAY. A romance of the French Revolution. By William Sage. Houghton, Mifflin & Co., Boston and New York, 1900. Cloth.

³ THE PARSONAGE PORCH. Seven stories from a clergyman's note book. By Bradley Gilman. Little, Brown & Co., Boston, 1900. Cloth, \$1.00.

¹ TALES FOR CHRISTMAS AND OTHER SEASONS. By François Coppée. Translated by Myrta Leonora Jones. Little, Brown & Co., Boston, 1900. Cloth, \$1.00.

² THE EMPRESS OCTAVIA. A romance after the reign of Nero. By Wilhelm Walloth. Translated from the German by Mary J. Safford. Little, Brown & Co., Boston, 1900. Cloth, \$1.50.

translated into English by Mary J. Safford. It is one of the most remarkable historical romances of recent times, and the translator has been most happy in retaining the spirit of the original work. The scene is laid in the time of Nero and the portraiture of that Emperor's character is drawn with a master hand. The sweet and simple nature of a young Greek sculptor and the virtue and dignity of the Empress Octavia, Nero's wife, are contrasted with the vice of the age and the artificialities of the courtiers who surrounded Nero, and the portrayal of Roman life at that time is wonderfully effective. The story is thrilling and dramatic and will produce as profound an impression as did Sienkiewicz's "Quo Vadis." We have only words of unstinted praise for this really great production.

*The Burden of Christopher*¹ was a burden which fell upon the shoulders of a visionary young man who undertook to reform the relations existing between employer and employee, applying his ideas to his own manufactory with results overwhelmingly disastrous to himself. The book is one of more than ordinary interest and enlists the sympathy of the reader throughout. The moral which it inculcates is the dreary hopelessness of the attempt of a single individual to solve the labor problem in the face of the fact that the competitive system and the Golden Rule cannot be harmonized. Christopher's burden was too heavy for one man to assume and the outcome was inevitable. The reader will find much to ponder over in these pages.

Heretofore economic literature has appealed rather to the manufacturing and commercial classes than to the rural people, but of late a good deal of valuable information has been prepared for the farmer and the agriculturist. Among the most important works recently published, Mr. Fairchild's *Rural Wealth and Welfare*² will appeal strongly to our great farming interests. The author does not assume that all questions of wealth and welfare can be settled by rule, but he points out the actual trend of facts, the universal principles sustained by the facts, and the means of most ready adjustment to circumstances in the evolutions of trade and manufacture. Mr. Fairchild has had an experience of more than thirty years at the Michigan and Kansas Agricultural Colleges, and is well fitted to discuss in

an authoritative manner the subject covered by his book.

If we are to retain the Philippines, there can be no question that the United States ought to establish there a civil service which shall be thoroughly efficient and free from political pressure of any kind, and hence it appears worth while to see what light can be derived from the experience of other nations. Much valuable information upon this point may be obtained from Mr. A. Lawrence Lowell's new work entitled *Colonial Civil Service*.³ The book contains the latest information as to the British system, and the methods of recruiting officials for the Colonies of Holland and France. Both the student and the general reader will find much of interest in these pages.

*"Currita, Countess of Albornoz"*² by Luis Coloma, translated from the Spanish by Estelle Huyck Attwell, is just issued by Little, Brown & Co. Although the work of a Jesuit priest, it is a novel of Madrid society, the corruption and follies of which it treats with a trenchant pen. "Never will a squint-eyed person," says the author, "understand his own defect, unless a faithful mirror be held before him which will reflect his crooked sight. Currita, the heroine, is a typical feminine coquette and politician, whose brilliant life and intrigues are contrasted with the loneliness of her little son.

This remarkable novel has had a great success in Spain. It is brilliant and powerful, and will meet a hearty welcome from American readers.

Little, Brown & Co., Boston, have just published "*For the Queen in South Africa*," by Caryl Davis Haskins, a collection of interesting short stories, each having to do with some incident of bravery. The titles are: The Full-Back Tells the Story; The Unrecorded Cross; The Winning of the Sword-Knot; At the Zariba; Judge Not; and Blood Will Tell.

The reader fond of the mysterious will find *The Bronze Buddha*³ a book decidedly to his liking. The story is one which once begun will not be laid down until the end is reached. The author has the happy faculty of deepening the interest of readers with every page.

¹ COLONIAL CIVIL SERVICE. By A. Lawrence Lowell. The Macmillan Co., New York, 1900. Cloth, \$1.50.

² CURRITTA, COUNTESS OF ALBORNOZ. By Luis Coloma. Translated from the Spanish by Estelle Huyck Attwell. Little, Brown & Co., Boston, 1900. Cloth, \$1.50.

³ THE BRONZE BUDDHA. A mystery. By Cora Linn Daniels. Little, Brown & Co., Boston. Cloth, \$1.50.

¹ THE BURDEN OF CHRISTOPHER. By Florence Converse. Houghton, Mifflin & Co., Boston and New York, 1900. Cloth, \$1.50.

² RURAL WEALTH AND WELFARE. Economic principles illustrated and applied in farm life. By Geo. T. Fairchild, LL. D. The Macmillan Co., New York, 1900. Cloth, \$1.25.

NEW BOOKS FOR LAWYERS.

THE COMPLETE COURT RULES. As amended to January 1, 1900. Matthew Bender, Albany, N. Y. 1900. Paper.

This work contains the rules of all the Courts of Record of the State of New York, with the judiciary article of the State Constitution and the rules regulating law examinations. It will be appreciated by all practitioners in that state.

THE CIVIL LAW IN SPAIN AND SPANISH-AMERICA, including Cuba, Puerto Rico and Philippine Islands. By CLIFFORD STEVENS WALTON. W. H. Lowdermilk & Co., Washington, D. C., 1900. Law sheep, \$6.25.

In view of our recently assumed relations with the former colonies of Spain, this work is certainly a timely one and one which will appeal not only to the legal profession, but to every person interested in these possessions, from a legal, commercial, political or historical standpoint. Mr. Walton gives a history of all the Spanish codes, a summary of canonical laws, of the principal *Fueros*, *Ordenamientos*, *Councils* and *Ordenanzas* of Spain from the earliest times to the twentieth century. The author's work has been thorough and exhaustive, and the treatise will prove of great service upon all questions arising in regard to Spanish law.

DEED FORMS ANNOTATED. Edited by EMERSON E. BALLARD. The Ballard Publishing Co., Logansport, Ind., 1900. Law sheep, \$3.50.

This volume is designed to furnish lawyers, bankers, abstracters, conveyancers and real estate dealers and land owners accurate information as to the formal requisites of a deed to land in all parts of the United States. The states are alphabetically arranged, each forming a separate division of the book, under which are set forth, with proper section heads, their respective statutory provisions concerning the requisites of a deed to land, to which are added the prescribed forms of deeds as provided for by statute. The provisions as to acknowledgment of deeds are also carefully set forth. The notes and annotations are very full. The work is one which well deserves a place in every lawyer's library.

AMERICAN STATE REPORTS, Vol. 71, containing the cases of general value and authority decided in the courts of last resort of the several states and territories. Selected, reported and

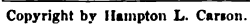
annotated by A. C. FREEMAN. Bancroft-Whitney Co., San Francisco. 1900. Law sheep, \$4.00.

INDEX-DIGEST OF CRIMINAL LAW, including Digest of Cases and all Statutory Law. By ZEB V. WALSER, A.B., L.L. B., Attorney General of North Carolina. Assisted by Z. I. WALSER, B. Lit., of the Lexington (N. C.) bar.

All the criminal statutes of the State of North Carolina contained in The Code of 1883 and the Acts of the Legislatures of 1885, 1887, 1889, 1891, 1893, 1895, 1897 and 1899 have been carefully digested and incorporated with the decisions in the Index-Digest, thus constituting the Index-Digest, a complete digest of all the criminal law, statutory and judicial, to be found in that state. In connection with each title there will be found a carefully prepared table of cross references. The value and importance of this feature cannot be too highly estimated. By this means the investigator is enabled to trace those topics which, being susceptible of separation, constitute independent titles; also to find other subjects more or less intimately related. The second part of the book, the "cited cases" feature, is an alphabetical list of the nearly twenty-eight hundred criminal cases to be found in the one hundred and twenty-four volumes of reports, with every citation of each case since it was decided, the point of law to which it was cited, and whether it has been overruled, criticised, doubted or distinguished. A very large number of civil cases, in which criminal cases have been cited and discussed, are to be found along with the criminal cases.

FORGERY, ITS DETECTION AND ILLUSTRATION, with numerous causes célèbres. Illustrated. By DANIEL T. AMES. Law sheep, \$3.00. Cloth, \$2.50. Address all orders to Danl. T. Ames, 24 Post St., San Francisco, Cal.

No expert on handwriting has attained a higher reputation than the author of this volume, and in this work he presents in a clear and simple manner some facts drawn from forty years of continuous work in connection with the chirographic art. The book is one of more than usual interest and the cases described include many of the most noted in the annals of American jurisprudence. Mr. Ames believes that in all cases wherein expert testimony is required the expert should be employed and paid by the court, and regarded as a court officer. In this we heartily agree with him.



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ALFRED MOORE.¹

BY JUNIUS DAVIS OF THE NORTH CAROLINA BAR.

ALFRED Moore was born in the county of Brunswick on the 21st May, 1755. He was the son of Judge Maurice Moore, whose wife was Anne Grange. He came from a line of men who had written their names upon the history of the Old World and of the New. He was a lineal descendant of that Roger Moore who was one of the leaders of the Irish rebellion of 1641, and who, Hume says, "first formed the project of expelling the English and asserting the independence of his native country." James Moore, by some accounts the son and by others the grandson of Roger Moore, had emigrated to Barbadoes prior to the accession of Charles II. to the throne, and from there he came to South Carolina with Sir John Yeamans, whose daughter he married, and settled near Charleston, in the famous Goose Creek settlement in Berkeley precinct.

It was a singular destiny which brought about this alliance and mingled in its offspring the blood of the Irish rebel with that of the English Cavalier. Sir John Yeamans was the son of Robert Yeamans who was High Sheriff of Bristol in 1643, when that city was besieged by the army of the Parliament under Lord Fairfax. So devoted to the cause of Charles was Robert Yeamans, and so sturdily and bravely did he bear himself in the defense of that city, that upon its capture Fairfax, in his wrath, hanged him off-hand in the street opposite his dwelling.

The Barbadoes had been an asylum for both Cavaliers and Roundheads, who, wearied

of the strife and persecution of the civil war, sought peace and rest in a distant land, and here came John Yeamans. He was one of the thirteen gentlemen of that colony who were knighted by Charles, when he came to his own again, for their sufferings and sacrifices in the royal cause. He was also, in January, 1665, made Governor by the Lords Proprietors, of the "County of Clarendon," afterwards the Province of South Carolina, stretching west from the Atlantic to those unknown waters called the Southern Seas and south to the Spanish possessions in Florida; and was also a Lieutenant General. In May, 1671, he was created a landgrave and given twelve thousand acres of land; and, in the same year, for a second time was made Governor. He carried with him to the Ashley his negro slaves, and, according to Bancroft, was the first to introduce negro slavery into the colonies.

James Moore was a bold, adventurous man, of high spirit, unflinching courage and strong mind, and he soon became a leader of men. He was Governor of South Carolina, in 1700; and, when succeeded in that office by Sir Nathaniel Johnson, in 1703, he was appointed Attorney General of the Province. His eldest son, James Moore, was also Governor of South Carolina, in 1720. He was one of the ablest soldiers of the Province, and had greatly distinguished himself in the wars with the Spanish and Indians. When the Tuscaroras, having recovered from their defeat by Barnwell, were again carrying the torch and tomahawk through the unprotected settlements of North Carolina,

¹ From an address delivered on presenting the portrait of Justice Moore to the Supreme Court of North Carolina.

in 1712, and Governor Pollock called upon South Carolina for aid, James Moore, the second, was selected to lead the men from South Carolina. With him, as an officer, went his younger brother, Maurice, to whom we owe the first permanent settlement of the Cape Fear country. Traversing this region on his toilsome march to the Neuse, and seeing the beauty of the land, the fertility of the soil, and the commercial advantages of the river and harbor, it is reasonable to presume that he then and there conceived the project which he afterwards successfully carried out. Lingered in North Carolina, a few years after the return of his brother to Charleston, long enough to marry one of her fair daughters, he returned to Charleston, and gathering about him the families of all his brothers and sisters (except his elder brother, James), and many of his friends, about the year 1723, for history leaves the exact time uncertain, he again struck into the wilderness, and settled them at and around Old Brunswick, on the west side of the Cape Fear river, about thirteen miles below Wilmington. And this was the first permanent settlement of the Cape Fear region.

His two sons, Maurice and James, were eminent and distinguished men and ardent patriots. Maurice was one of the three Judges of the Province at the breaking out of the Revolution, and was "a learned jurist, an astute advocate, and a keen-sighted statesman." James was a soldier and "considered the first military genius of the Province." He was Colonel of the First North Carolina Continental Regiment in September, 1775, and Brigadier General in March, 1776. Upon the departure of Lee for the North, in the summer of 1776, he was appointed by Congress Commander-in-Chief of the Southern Department. But a few months after, however, his health failed, and he died in Wilmington on the 15th of January, 1777; and, on the same day, in the same house, died his brother Maurice, both "in the prime of life and in the meridian of their fame and usefulness."

In 1764, while yet a youth, Alfred Moore was sent to Boston to complete his education. Judge Taylor says that "on the arrival of the British troops there, in 1768, he attracted the notice of a Captain Fordyce, a man of fine taste and acquirements, who became much attached to the youth, and offered to procure him an ensigncy in the army. This he declined, but under the instructions of his friend he learned the elements of military science, and furnished himself with a variety of knowledge which highly qualified him for that stormy period in which he was destined to live." On September 1, 1775, while not yet of age, he was appointed a captain in the First North Carolina regiment, commanded by his uncle, James Moore. After participating in the short but brilliant campaign which resulted in the total defeat and destruction of McDonald's Royalist Highlanders at Moore's Creek, in February, 1776, his regiment, then commanded by his brother-in-law, Colonel Francis Nash (Colonel James Moore having been appointed Brigadier General in the Continental line), was ordered to Charleston to assist in the defense of that city against the threatened attack of the British under Sir Henry Clinton and Lord Cornwallis. With his company he bore his part in that memorable attack on Fort Moultrie in June, 1776, when the North Carolinians behaved with such gallantry as to draw from Charles Lee the eulogium: "I know not which corps I have the greatest reason to be pleased with, Muhlenburg's Virginians or the North Carolina troops—they are both equally alert, zealous and spirited." And what higher testimony to the valor of the North Carolinians could we have than this, when a Virginian reckons them as equal to the best regiment Virginia had sent to the field! After the repulse of the British at Charleston, Moore's regiment was camped at Wilmington, where it was put through a rigid system of drill and discipline which gave it the efficiency that distinguished it in the later northern campaigns.

In March, 1777, the regiment was ordered

north to join Washington, who was then retreating through New Jersey and in great straits. Captain Moore did not accompany his regiment, for he had been compelled by the misfortunes and necessities of his family, to resign his commission on the 8th of March, 1777. His brother Maurice, a lieutenant in his regiment, had but recently been killed, his father had died, and the utterly disordered and defenseless condition of the country around Wilmington commanded his presence at home. But, though no longer in the Continental line, he still kept the field, and enrolling himself in the militia became an active and zealous partisan. With a few raw but restless spirits he made himself such a thorn in the side of the British at Wilmington that Major Craig, in command there, sent a detachment to his plantation, which plundered his house, burned all the buildings on the place, carried away all his stock and left him utterly penniless and destitute. But his lofty courage and ardent patriotism were unshaken by these trials, and he continued to lose no opportunity to harass his enemy whenever an opportunity afforded. Judge Taylor tells us that Major Craig made every effort to kill or capture him, and, failing in both, sent him an offer to restore his property and give him amnesty if he would only return to his plantation and take no further active part in the war. But this offer was spurned by him, and his efforts in the cause of freedom and independence were never relaxed until the final triumph.

The close of the war found him ruined in fortune and estate. His plantation was a waste, his slaves scattered and stolen, he himself without resources or money, his family almost destitute of food and clothing. His condition was indeed deplorable. He had, prior to the breaking out of the war, studied law under his illustrious father. I have seen it stated that he was appointed Attorney General of the State before he had obtained a license to practice law, but this is a mis-

take, for in the minutes of the county court of New Hanover, April term, 1775, I have seen the record of his producing a license to practice law in the inferior courts of the State and taking the usual oath required.

It is certain, however, that if he had ever had any practice at the bar it was but very limited and of very short duration.

At the June term, 1782, of the court for the Hillsboro district, in the absence of the Attorney General, "the court," to use the words of Judge Williams, "got the favor of Colonel Alfred Moore to officiate as attorney for the State, and without whose assistance, which the court experienced in a very essential manner, they could not have carried on the business of the court." There were many important criminal cases at this term, and seven capital convictions, for burglary, high treason, etc.

In 1782, the General Assembly of North Carolina, in grateful remembrance of his distinguished services, and in some part to compensate him for his losses and unselfish patriotism, recognizing his eminent abilities, appointed him Attorney General of the State to succeed Iredell, who had just resigned. We are told that the salary of the first two years of his office was paid in homespun and provisions. Think upon it a moment, your honors, what would be the consternation, the utter misery, of the present Attorney General, if such legal tender were proffered him for his salary! To a weak man, the high position to which Alfred Moore had been called at the very outset of his career as a lawyer, would have been but a quicksand and a pitfall. But he was anything but weak. Judge Taylor tells us that he had a mind of uncommon strength and a quickness of intellectual digestion that enabled him to master any science he strove to acquire. He was small in stature, scarce five feet four inches in height, neat in dress, graceful in manner, but frail in body. He had a dark, singularly piercing eye, a clear, sonorous voice, and those rare gifts of oratory that are born with

a man and not acquired. Swift was his model, and his language was always plain, concise and pointed. A keen sense of humor, a brilliant wit, a biting tongue, a masterful logic, made him an adversary at the bar to be feared. Judge Murphy, in his address before the societies of the University, says: "Two individuals who received their education during the war were destined to keep alive the remnant of our literature, and prepare the public mind for the establishment of this University. They were William R. Davie and Alfred Moore. Each of them had endeared himself to his country by taking an active part in the latter scenes of the war; and, when public order was restored and the courts of justice were opened, they appeared at the bar, where they quickly rose to eminence, and for many years shone like meteors in North Carolina. . . . Davie took Bollingbroke for his model; and Moore, Dean Swift. . . . Public opinion was divided upon the question as to whether Moore or Davie excelled at the bar. . . . Davie is certainly to be ranked among the first orators, and his rival, Moore, among the first advocates, which the American nation has produced."

In 1790, indignant at what he considered an unconstitutional infringement upon his rights by the creation of the office of Solicitor-General, and being worn and exhausted by the constant and arduous toil and labor entailed upon him by a large practice, he resigned his office; and, virtually abandoning his practice, retired to his plantation. He was a Federalist in politics, and, in 1795, was defeated for the Senate of the United States by one vote. In 1798, he was elected one of the Judges of the State and took his seat upon the bench. In delivering the opinion in *State v. Barna Jernigan* (3 Murphy, 12), Chief Justice Taylor pays high tribute to his character and ability: "The very question, however, before us, has been decided in the case of *State v. Hall*, in 1799, by a Judge whose opinions on every subject, but particularly on this, merit the highest

respect. Judge Moore was appointed Attorney General a very short time after this act of assembly was passed, and discharged for a series of years the arduous duties of that office in a manner which commanded the admiration and gratitude of his contemporaries. . . . His profound knowledge of the criminal law was kept in continual exercise by a most varied and extensive practice at a period when the passions of men had not yet subsided from the ferment of a civil war, and every grade of crime incident to an unsettled society made continual demands upon his acuteness. No one ever doubted his learning and penetration; or that, while he enforced the law with an enlightened vigilance and untiring zeal, his energy was seasoned with humanity, leaving the innocent nothing to fear and the guilty but little to hope. The opinion of such a man, delivered on an occasion the most solemn on which a judge could act—when doubt in him would have been life to the prisoner—assumes the authority of a cotemporary exposition of the statute, and cannot but confirm me in the sentiments I have expressed."

In this connection, I am reminded of a tradition that I heard from some of the seniors of the bar when I was, first admitted to it. About the year 1816, there was a band of robbers and outlaws operating chiefly in Duplin, Sampson, Wayne and the nearby territory, whose chief purpose was enticing slaves from their masters under the promise of freedom and spiriting them away to the far Southern States and selling them. Chief among these were the Jernigans, and chief among them was the Barna Jernigan above mentioned. He had been indicted and convicted for enticing away the slave of one John Coor Pender, then sheriff of Wayne County. The story runs, that as Coor Pender was on his way to court to give evidence against Barna Jernigan, he was waylaid, shot and killed by one of the band. His eldest son, then a lad of about nineteen years of age, vowed to devote his life to the pursuit and

punishment of the murderer of his father. Alone he tracked him through North Carolina into South Carolina, through South Carolina into Georgia, through Georgia into Florida, where at last he found him—secure, as his coward's heart believed—refuged among the Seminole Indians. Nothing daunted, young Coor Pender boldly made his way into the Seminole country and, addressing their chief, demanded the assassin with that plea so sacred and dear to the heart of the Indian, that blood alone can atone for blood. Bowing to the justice of the demand, the Seminoles surrendered the man, whose name, I think, was also Jernigan, to young Coor Pender. Binding his prisoner, unaided he brought him back through the long and wild journey and delivered him into the hands of justice in Wayne, where he was soon afterwards tried, convicted and hanged.

No brilliant feat of the days of chivalry can to my mind surpass this courageous and devoted act of this plain and simple young North Carolinian.

In December, 1799, Mr. Moore was called to the seat upon the Supreme Bench of the United States made vacant by the death of James Iredell. He first sat at the August Term, 1800, when, in *Bas v. Tingy* (4 Dallas, 37), on the admiralty side of the docket, he delivered the only opinion emanating from him during the four years of his judicial life on that bench. This seems strange, and forces us to inquire the reason of this singu-

lar silence of so able a lawyer. The answer is found in the pages of Dallas and Cranch, and is given by Mr. Carson, in his *History of the Supreme Court of the United States*, who tells us that it was owing to the practice which obtained after Marshall came upon the bench of making the Chief Justice the organ of the court. So strictly was this rule adhered to, that during Justice Moore's term of office the opinion of the court was always delivered through the Chief Justice, except in one or two instances, when he expressly declined to do so, and then that duty fell upon the Senior Justice. We must remember that the court was then but an infant, its docket exceedingly light, and it was no great labor for one Judge to write all the opinions. There can be no doubt, however, that, in the solemn deliberations of the conference chamber, Moore's opinion upon every question under discussion was given in clear, concise and logical argument, was listened to with deference, and carried the weight of his great talents with it. He remained upon the bench about six years, when his failing health compelled his retirement and he resigned in 1804. He died on the 15th of October, 1810, in the fifty-fifth year of his age, "a loyal, just and upright gentleman," carrying with him to the grave the blessed comfort of a well-spent life, the affection of his friends, the sincere respect and reverence of all men, and the grateful appreciation of his native State.



THE VAGRANT AND THE LAW.

BY GEORGE H. WESTLEY.

IN the days of King Hlothære, who reigned in Kent in the latter part of the seventh century, those who gave shelter to a wanderer had to be very careful. It was a law under that monarch that "if any man entertained a stranger for three nights at his own home, a chapman, or any other that has come over the march, and then feed him with his own food, and he then do harm to any man, let the man bring the other to justice, or do justice for him." This is held by Mr. Ribbon Turner, an authority on this subject, to mean that "the host who entertained a stranger did so at the risk of incurring responsibility for any offence his guest might subsequently commit."

There is an old English saying: "Two nights a guest, the third night one's servant." This was probably the idea on which the law just quoted was based; it appears at any rate to have been in the mind of Edward the Confessor when he enacted the following law in 1045: "If any entertain a man known or unknown for two nights, he may keep him as a sojourner; and if the man do wrong the host shall suffer no loss for him. But if he to whom the man has done wrong makes complaint to justice in that it was done by the counsel of the host, then the host shall purge himself by oath with two law-worthy neighbors if he can, both of his counsel and the deed. Otherwise he shall make good the loss and the wrong. But if he shall entertain the man a third night, and that man shall do wrong to any, the host shall bring him to justice as though he were one of the household. . . . And if the wrongdoer cannot make good the damage, the host who entertained him shall make good the loss and the forfeit."

Withroed, King of Kent, made a law directed against wandering monks who were in

his time rather more numerous than desirable. "If any shorn man go wandering about for hospitality, let it be given him once; and, unless he have leave, let it not be that any one entertain him longer."

King Henry I. enacted that if any friendless man or foreigner came to such a pass that he had none to befriend him, "let him, on the first accusation, be laid in prison, and there let his accuser sustain him till he shall come to trial."

It was a law in the time of Richard II., 1388, that persons who had left service in one place and were travelling to another, should carry with them a testimonial from last employer. If found wandering without such letters they were to be put in the stocks and kept there until they could satisfy the authorities that they were not vagrants.

About the year 1348, when the plague known as the Black Death was decimating England, there was a great demand for laborers. Wages rose to a great height and the toilers found themselves practically masters of the situation, being able to demand what they liked for their services. The number of laborers wandering about to sell their labor in the best market, swelled the ranks of vagrancy to the full. King Edward to meet this emergency prepared an instrument which is known as the Statute of Labourers. One clause of this provides "that every man or woman in England, of what condition he be, free or bond, able in body, and within the age of threescore years, not living in merchandise, nor exercising any craft, nor having of his own whereof he may live, nor proper land about whose tillage he may himself occupy, and not serving any other . . . he shall be bounden to serve him which shall him require." And another clause compels him to "take only the wages, livery, meed,

or salary which were accustomed to be given." In the latter part of the fifteenth century, the penalty for vagrancy in England was three days and three nights in the stocks without other sustenance than bread and water, and the vagrant was then driven from the town.

Henry VIII. tried hard to stamp out the pest of vagabonds and thieves, and is said to have hanged no fewer than seventy-two thousand of them, "great thieves, petty thieves and rogues." Lighter offenders such as "michers that live in truandise; flouches, who put soap in their mouths to make foam, and fall down as if they had Saint Cornelius's evil; Newgate nightengales who strut about pretending they have suffered shipwreck; rufflers and rogues which say they are poor scholars of Oxford or Cambridge"—all these were to be stripped naked from the waist upwards, men and women alike, scourged sharply and sent home. They had to take with them a billet signed by two justices certifying that the punishment had been inflicted.

But the foregoing laws against "idleness and vagabondry" were mild compared with those of Edward VI. The severity of these enactments is thought to be due to the fact that Sir John Cheke, Greek professor at Cambridge and one of the preceptors of the new king, had rendered fashionable at the time a study of the laws of Lycurgus, Draco, and Solon, ancient legislators who were particularly down on mendicants. The act of Edward VI. begins with the statement that idleness and vagabondism is the mother and root of all thefts, robberies, and other evil acts and mischiefs. It then proceeds to repeal all former laws against vagabonds and beggars, and ordains that every person not impotent, found loitering or wandering and not seeking work, or leaving it when engaged, shall be taken up as a vagabond, and every master who has offered such idle person service and labor, shall be entitled to bring him before two justices of the peace who "shall immediately cause the said loiterer to be marked with a whott iron in the breast the marke of V, and adjudge the said

parson living so Idlye to such presentor to be his Slave, and to have and to hold the said Slave to him, his executors or assignes, for the space of twoo yeres then next following." The slave was to be fed on bread and water or small drink and such refuse meats as the master thought fit; and if he refused to work his master could belabor him without penalty. If such a one ran away and was captured, he was branded on the forehead or cheek with the letter S. If he ran away with this mark upon him, he was when caught executed as a felon. This Draconic law remained in force only two years.

By a proclamation of the city of London dated 1584, all vagabonds and masterless men, as well strangers as Englishmen, were ordered to leave the city within five days; and all who sold food were forbidden after that time was expired to sell to any serving-man who could not produce a testimonial from his employer.

But all these laws seem to have had little permanent effect in repressing vagrancy, for at Cambridge, in the year 1557, "the vagabonds, naughtie and jolly persons" were stated to be "farr more in numbre than hath been in tymes past."

In 1595, the privy council of London got an idea into their heads that it would tend to lessen vagabondism if certain days were observed as fish days; therefore they caused Friday and Saturday of every week to be so appointed, and made it unlawful for any person within the realm to eat any flesh on those days, upon pain of forfeiting three pounds for every offence, or suffering three months' imprisonment. Their argument was this: the sale of fish would be increased, and so many idle fishermen would be given employment. Moreover, as many of the seacoast towns were falling into decay, the increased demand for fish would, by building up the shipping interests, giving work to shipwrights, ropemakers, sailmakers, blacksmiths and others, cause these moribund towns to take on a new lease of life. "And this proclama-

tion is necessary by reason of the uncertainty of the sale of fish, and the contempt which in eating of fish is concerned."

Queen Elizabeth once instituted a grand raid upon tramps and loafers. Apprehending that a rebellion would break out, she quietly sent letters to her sheriffs and magistrates, ordering that on a certain night they should seize all vagabonds and idle persons who had no master nor any means of living, and either put them in jail or send them to their homes. Upwards of thirteen thousand persons were thus seized and were dealt with according to her Majesty's will, although her orders were without proper legal support.

It appears to have been the custom in certain parts of England, early in the seventeenth century to first whip the vagrant and then salve his wounded back with a small sum of money to help him along. Thus we find in the accounts of the constables of Melton-Mowbray, Leicestershire, the following:

1602—Given to Robert Moodee for whippin two
pore folks 1 jd
And gave them when they were whipped 1 jd

It was sometimes the good fortune of the boys of those days to have sweet revenge on their elders.

1602—Given to Tomlyn's boy for whippin a man
and a woman 1 jd
And gave them when they went 1 jd

In 1618, King James wrote to Sir Thomas Smyth who was Governor of the Virginia company, that "Whereas our court hath of late been troubled with divers idle young people who although they have been twice punished, still continue the same. . . . We, having no other course to clear our court from them, have thought fit to send them unto you, desiring you at the next opportunity to send them away to Virginia, and to take such order that they may be set to work there, wherein you shall not only do us good service, but also do a deed of charity by employing them who otherwise will never be reclaimed from the idle life of vagabonds."

One of the old English vagrancy statutes

contained a singular clause giving immunity to two classes of vagrants, viz:—"diseased poor travelling to Bath or Buxton, and John Dutton's fiddlers in the County of Chester." The privilege of the fiddlers dated from 1210, when the Welsh in great force besieged the Earl of Chester in Rhuddlan Castle. The earl sent word to his steward to collect troops and raise the siege, and the steward entering Chester at Midsummer fair, and finding there a great mob of fiddlers and players, marched with them and frightened off the Welsh, who took them for an army. And so the earl ever afterward favored the fiddlers over other vagrants, and caused them to be made exempt from law.

In Wales in the twelfth century, the vagabond seems to have had rather a good time of it. Cambrensis says, "No one of this nation ever begs, for the houses of all are common to all; and they consider liberality and hospitality amongst the first virtues. So much does hospitality here rejoice in communication, that it is neither offered nor requested by travellers, who, on entering any house, only deliver up their arms. When water is offered to them, if they suffer their feet to be washed, they are received as guests, for the offer of water to wash the feet is with this nation a hospitable invitation. But if they refuse the preferred service, they only wish for morning refreshment, not lodging." These guests sometimes stole out in the night and committed theft. One charged with this crime could be cleared if his host would only swear that he had put his hand three times over him in the night.

In the fifteenth century it was a law of the Isle of Man "that no one bring beggars or vagabonds into the country, upon pain of forfeiture of his boat."

In 1662 was passed in England the settlement act, a supplement to the ineffectual Poor Law of 1601. It was a kind of serfdom over again, the laborer being strictly bound to his own parish, and it was meant to stop the wandering to which public opinion attributed

the spread of the plague. This law was not a success, and it soon became a grievous expense. Returned paupers filled the carrier's wagons; and after they had got their papers from the magistrates, they would produce a lot of luggage, good clothes, bonnet boxes, etc., and insist on these being carried.

The Dutch had their own peculiar way of dealing with the pest of vagabonds. They put the loafer in a water-tight 'compartment with a pump in it and a tap high out of reach. The water was set running and the fellow was obliged to pump in order to save himself from being drowned.

Washington Irving in his history of New York describes the strange gibbet by which Governor William, the testy, suspended tramps by the waist. Says he: "It is incredible how the little governor chuckled at beholding caitiff vagrants and sturdy beggars thus swinging by the crupper, and cutting antic gambols in the air. He had a thousand pleasantries and mirthful conceits to utter upon those occasions. He called them his dandelions, his wild-fowl, his high flyers, his

spread eagles, his goshawks, his scarecrows, and finally his gallows-birds. . . . Such was the punishment of all petty delinquents, vagrants and beggars, and others detected in being guilty of poverty in a small way."

A good deal might be added on the more recent vagrancy laws of our own county. A few items, however, must conclude my article. The tramp law of Ohio once imposed a penalty of three years' imprisonment for kindling a fire on the public highway or entering a yard uninvited.

Besides the state law, some of the towns of Ohio issued edicts of their own on the matter, as for example: "Tramps, Attention! All tramps will take notice that they are hereby notified not to come inside the limits of the city of Springfield. And all tramps being found inside the corporate limits of said city after this date, will be arrested and placed on the chain-gang, and be compelled to break stone for the term of five days."

But in spite of centuries of legislation against him, the vagabond is still with us. What shall we do with him?

CAPT. JOHN CARTER vs. THE PROVINCE OF MASSACHUSETTS BAY.¹

BY LOUIS CRAIG CORNISH.

WHEN Captain John Carter, H. R. N., Commander of the Royal Frigate *Eagle*, married Miss Mollie Stuart of Richmond, Virginia, in the year 1699, it did not appear that within three months he would be whipped on Boston Common because of his love for her, that a worthy magistrate of Massachusetts Bay would be involved in a

trying interpretation of colonial law, and that the question of where justice really lay in the affair would be left still unanswered two hundred years after the event: yet such was the case.

Captain and Mrs. Carter, however, were quite unconscious that any peculiar significance was attached to their movements when, shortly after their marriage, they sailed away in the *Eagle* toward the north, where the frigate was ordered to join the squadron then at Newport. Immediately on her arrival, she was ordered to proceed to Portland, and returning, to cruise along the coast stopping at all the settlements. The honeymoon

¹ For early reference to this case, see p. 72 of John Dunton's "Letters from New England, A. D. 1686," (Prince Society Publications, 1867); also, p. 149 of "Travels through the Middle Settlements in North America. In the years 1759 and 1760, with Observations upon the State of the Colonies, by the Rev. Andrew Burnaby, A. M., Vicar of Greenwich. Second edition. London. Printed for T. Payne, at the Mews-Gate, MDCCLXXV."

spent on shipboard had not been what the newly wedded couple had expected for Mistress Mollie had suffered much from seasickness. The voyage around Cape Cod did not help the malady and so John Carter decided to leave his bride in Boston while he made the trip further up the coast, and thus it happened that Mistress Mollie Carter watched the *Eagle* sail away behind the islands in Boston harbor, with sadness it is true, but with no premonition of coming trouble.

That we may understand the following events, we must remember how sorely tried the Puritan fathers had been over the growing tendency to desecrate the Sabbath. From the fines imposed on guilty folk, we learn the disheartening fact that many persons openly walked about in the fields and lanes on Sunday just as if it were a week day, that men travelled on horseback without any sufficient excuse for such journeys, and that in Boston boys had been captured by the constable as they "swum in the water." When we add to these breaches of the peace the sad evidence that there were men, presumably most of them were bachelors, who absented themselves from public worship, we cannot wonder at the anxiety of the fathers which led them to pass stringent laws "for the Better Observation and Keeping of the Lord's Day."¹

The General Court enacted that henceforth on Sundays all persons "should carefully apply themselves to duties of Religion and Piety, publicly and privately;" that no one "should upon the land or water exercise any Labour, Busines or work of their ordinary Callings upon pain of forfeiting Five Shillings;" and that no man "should travel on that Day except by adversity they were belated and forced to lodge in the Woods,

Wildernefs, or Highways the night before, and in such case to Travel no further than the next Inn or place of Shelter on that Day, upon penalty of Twenty Shillings." Every Justice of the Peace was given authority "to Convent before him" any guilty person and to fine them.

At the same time the General Court was also moved to fix a fine of ten shillings for swearing and "cursing, and to provide that if the person convicted should be unable or should refuse to pay the fine, he should be whipped not exceeding ten stripes for each offense.

But Mistress Mollie Carter was ignorant concerning these essential points of Massachusetts criminal law. The Virginians, of whom she was a fair type, never had the time to plant many vineyards in the next world because they were so busy enjoying the delights of the world in which they found themselves. Mollie herself had ridden across country after the hounds on a Sunday afternoon side by side with her father and the rector of their Episcopal Chapel, and as all three of them had said their prayers in the morning, they were quite unconscious of any reason why they should not afterwards enjoy the pleasures of the chase. Yet this attitude of mind, pleasant as were its consequences in Virginia, did not lead to a sympathetic understanding of the customs in Massachusetts Bay.

So when the fifth day came after the *Eagle* sailed, the time her husband had set as probable for his return, Mollie Carter was not in the least disturbed to find that it was Sunday. As there was little chance of the frigate arriving before afternoon, Mollie went to King's Chapel in the morning to hear the solemn liturgy of her Church, and afterwards decided to spend the time upon the beach until she should see the *Eagle* sail up the harbor. Her Puritan hostess looked upon her attendance at the Chapel with unwilling tolerance, as she had been brought up in error her hostess felt that perhaps she was

¹ See chapter VIII, "Acts and Laws of His Majesty's Province of Massachufetts Bay in New England. Passed June 8th, 1692. Boston in New England. Printed by B. Green, Printer to the Honourable, the Lieut. Govenour and Council, for Benjamin Eliot, & Sold at his Shop near to the Town House in King's-Street."

not wholly to blame; but in the afternoon when Mollie called for her little negro slave to go with her to the shore, the good woman felt that at least she must protest.

"It's against the law to visit the beach on the Lord's Day," she told Mollie.

But Mollie did not take the warning seriously. "Surely the elders won't mind my going to meet my husband," she answered, and quite unheedful of the looks of disapproval cast upon her, she and her young attendant walked away down Summer Street toward the shore.

"Does the woman expect her husband upon the Lord's Day?" asked one of the Puritan fathers who had stopped at the door on his way to the afternoon meeting.

"Captain Carter said that he would be back in five days," replied Mollie's hostess, taking the indirect road to truth, "and he left on Tuesday."

"But he wouldn't bring in his ship upon the Sabbath!" her visitor protested. "He could wait at Portsmouth or at Salem."

"You know as much about it as I do," she answered, scenting danger and rather liking the smell of it.

And her intuition was right, for it was hardly two hours later, just when Mollie was beginning to tire of watching the channel between the islands and when the minister up at the meeting-house had reached only the middle of his sermon, that the whole community was startled by the report of a cannon. The Eagle had entered the harbor and John Carter, through his spyglass seeing Mollie on the beach, from the very gladness of his heart had ordered a salute.

The roar of his cannon, however, had a far greater effect than to cheer his sweetheart. It brought a large part of the population hurrying to the shore to learn its meaning. Even the minister shortened his sermon by some thirty closely written pages and with a brief benediction dismissed his congregation, whose flight to the shore he followed as quickly as decency permitted.

So it happened by the time the Eagle had come to anchor and the long boat had been launched from her side, that a goodly company was waiting on the shore to see John Carter land. Mollie was not surprised at their presence. To her mind nothing could be more natural than that people should want to see John Carter as soon as they could, and John thought it quite fitting that the townsfolk should be on hand to take care of Mollie. Neither Mollie nor John felt the least embarrassment when he jumped out of the long boat, and taking her in his arms kissed her on both cheeks.

Indeed they might have been tempted to continue in this pleasure, had not one of the magistrates interrupted them by asking John Carter if urgent business with the Colony had brought him into port upon the Lord's Day. John laughed, and with his arm still around Mollie, he answered, "Isn't here enough reason to bring any man to port, Master Dunton?"

But Master Dunton was a justice of the peace and the eyes of the community were upon him, so he hardened his heart against the picture of youth and love before him. He replied that Captain Carter had defied the law of the Province, and that it would be the duty of the constables to act in the matter. John Carter was slow to believe that this Puritan magistrate before him was in earnest, but he was forced to recognize that such was the case when Master Dunton ended his harangue by saying, "And you've kissed your wife three times, Sir, before all these people, a most indecent proceeding, Sir."

Now John Carter had been born a sailor and would not have been afraid of the devil himself, and besides his fearless spirit he had at his command a rare and rich vocabulary of curses which he proceeded in no stinted way to pour out upon the astonished magistrate. He damned the morning that unhappy Puritan was born, the colony that bred him, the very rocks and rills around Massachusetts Bay, and he ended by walking off

through the gaping crowd with Mollie on his arm, breathing general maledictions as he went.

Which proceeding soothed the feeling of John himself, and was also a sweet satisfaction to Mollie; but it had an effect far from quieting on the Puritan fathers who had been so roundly cursed. Their indignation at his breaking the Sabbath was deepened now by a real grievance and their determination became unchangeable that he should pay the penalty for his sin which a wise generation had provided in the law of the Province. Only their reluctant deference to his rank saved him from spending the night in the town house, but justice deferred was only the more certain.

Next morning two constables waited on him, and explained that they were sent to conduct him to Elisha Dunton, justice of the peace, before whom he must answer for his conduct upon the previous day. He had thought little of the matter after he and Mollie were in their own lodgings, and even now he was inclined to treat it lightly, so he followed the constables without any show of temper. But when he reached the court room where Master Dunton was dispensing the King's justice, he found that the affair was really serious. The room was filled with the leading people of the town, who had come to enjoy the rare spectacle of an officer of the royal navy pleading before the bar of the colony.

The legal proceedings were very brief. Master Dunton accused John Carter of breaking the Fourth Commandment, read him the statute against breaking the Sabbath from a big book on the desk before him, and then asked if he would pay the ten shillings' fine thereby imposed.

John Carter knew the Puritan character too well to argue the matter. The men before him would have enjoyed nothing more than a long debate for and against keeping the Lord's day, and this satisfaction he was determined not to give them, so he threw a

gold piece on the counter against which he was leaning, and merely said that he had not known about the law when he broke it.

He expected that this would end the matter, but he did not know either the Puritan character or his own so well as he had thought. Master Dunton, having disposed of one misdemeanor and received the fine for it, now proceeded to the next charge, which related to Capt. Carter's violent cursing. He read the statute, which provided a fine of ten shillings for the first offense, with two shillings apiece for each additional curse, and reluctantly he admitted that no one present had been able to count the curses which John Carter had used, for which he said he had decided to name the round sum of forty shillings as a proper compensation to the outraged community; and during the whole of this exhortation John kept his temper. But when Master Dunton ended by saying that in view of his ignorance the court would pass over his indecent behavior in three times kissing his wife before the public, a misdemeanor forbidden by law, John's pot of wrath boiled over, and once more his hissing curses fell upon astonished ears. Again he roundly damned the company before him, and he vowed that he would never pay a farthing of this last most unjust fine.

Of course John Carter didn't know the alternative in store for him and was surprised when Dunton ordered that he should bear the full rigor of the law, that on the Common he should be given forty stripes save one from the cat o' nine tails. Had he known just what Dunton could do, perhaps he would have swallowed his pride and paid the fine, but he had vowed that he wouldn't pay it, and there was no other course open for him now but to take his punishment with what grace he could. So he merely said that the sooner he was whipped and through with it the better he would be pleased, and the court graciously granted him his wish. Indeed, they adjourned in a body to the Common to enjoy the spectacle,

and gathered an appreciative crowd of sight-seers as they went. Arrived at the place of execution, John Carter's coat, shirt and doublet were pulled off, and on his bare back he received the thirty-nine stripes.

A wholesome remembrance of his rank softened the blows, which on his sturdy frame caused no great suffering. Nor did the experience have any very humiliating effect upon his spirit. Indeed, we find it hard to understand the equanimity with which our fathers took their floggings, apparently feeling no more hurt about them than we did as boys when we were caned at school. Then too, if the whole truth must be told, in his younger days at sea John Carter had been whipped several times before. So he bore the punishment stoutly, stifled a last damn that he longed to fling at the men who had so beset him, and, after his beating, walked away with his head erect and without showing any sign of chagrin.

But it must not be supposed that he really was good-natured over the affair. Deep down in his heart he was as mad as he could be, and when Mollie learned of all that had happened, she shared his feelings with all the intensity of her hot southern nature. She was for challenging the chief magistrate, perhaps the governor himself, to mortal combat, a method much to John Carter's liking, but he said it probably was against the law in this strange province even to speak of pistols, and that they would have to think out some other method of revenge. To what result their thinking led them, the sequel shows.

The whole town was surprised that the Eagle gave no sign of haste to leave the harbor, after the strange reception accorded to her captain. Far from wishing to hurry away, John and Mollie appeared to hold no grudge against the community for what had happened. They were seen walking about the streets in evident peace with all men. The governor of the colony and some of its

leading men soon called upon them, and by the end of their first week in Boston they were social favorites. They were asked here and there to dinners, tea parties and picnics, which then were much in vogue, and they were made much of, just as foreign visitors are entertained among us to-day. Even Master Dunton was mollified by the good-natured way in which Captain Carter treated the matter of his arrest, and he went so far as to give a dinner at the Green Dragon in John's honor.

But the Eagle was needed on His Majesty's business elsewhere, and so after three weeks spent in social gaiety John Carter set the date for his departure and as a fitting close to the good times they had had together he asked a few of the leading men of the town to dine on board the frigate the day she was to sail.

Mollie received the guests upon the quarter deck and showed them about with all the pride of ownership. To her thinking the Eagle was John Carter's, and as John Carter belonged wholly to her, the conclusion of the matter was obvious. And John Carter was as jolly a host as ever welcomed friends aboard a ship. He was proud of his wife, and proud of his frigate, and in the galley a good dinner was cooking, — conditions which cheer the hearts of men. The great sails, already unfurled, for the frigate was to sail with the ebb tide, flapped idly above the party as they moved about the decks, the fragrance of coming dainties occasionally reached them from the forward part of the ship, and these ten Puritans felt inclined toward a more genial view of life than they would have owned to on shore.

Their cheer was not lessened when the dinner was served. Fancy courses, with some attempt at grandeur in the serving, above all the excellent wine which filled their hearts with its pleasant glow, were not everyday experiences to these worthy men seated about the cabin table, and as the dishes came and went, they began to realize the depth of

their affection for John Carter and to express it in the pompous phraseology so dear to them. Of course John Carter in reply said the proper things in the proper fashion. He told them he never should forget their kindness to him and to his wife or the good times they had enjoyed together, and in this he was sincere, for at no time of life is a man more grateful toward his fellows than during his honeymoon. But the remembrance of their first meeting was still present in the minds of some of his guests, and one of them alluded to it.

"Don't speak of it," John replied good-naturedly. "You know Virginia was the only Colony I had seen and they don't keep the Sabbath there as you do."

This statement cast a momentary gloom over the company, for the Puritans always felt a vague responsibility for the other colonies whose prosperity in wickedness was ever a stumbling block to their spirits. So partly to call their minds back again to the present, but more from a love of sport, John continued, "Come, Dunton, you know we're all friends here; and speaking of the way you thrashed me, tell us truly now, did you never swear yourself?"

Dunton was under the spell of that unquestioning confidence in his friends that accompanies a pleasant distension beneath the waistcoat and he also was warmed by the genial smile of encouragement which beamed upon him from all the company. He hesitated only a minute, toying with his wine glass before he took the plunge. Then he said, "Well, yes, I have sworn."

Cries of "Tell me when!" "What did you say, now?" "Let's hear about it!" greeted him from every side.

But he was not to be lured into giving the particulars of his iniquity. He felt that already he had admitted far too much. The Puritan character might open its shell for air now and then, but like the oyster it always closed resolutely when anybody wanted it to open.

John Carter, however, was not to be drawn away from his purpose, and he returned again to the charge. "I have hopes of you Dunton, since you can swear with the rest of us," he said. "Come now, tell us, did you ever kiss your wife in public?"

A hearty laugh greeted this sally, but Elisha Dunton was no child to be led against his will into further confession. "Never, Sir," he answered with some warmth, "Never."

An awkward moment might have followed this denial of human frailty, but the company was saved from such embarrassment. Just then a sailor appeared at the hatchway, and touching his cap said to the Captain, "The tide has turned, Sir."

The guests knew that this meant it was time for them to leave, and John Carter stood up at the head of his table and said, "A last toast, gentlemen,—may we meet again."

All the men rose and silently drank the toast. Then after the usual courtesies they passed up the companionway to the deck.

The sails were already bending to the wind, the great anchor was apeak and the little eddies which bubbled up by the side of the frigate showed that she was beginning the long homeward voyage. One by one the guests shook hands with John Carter and climbed down the ladder to their rowboat which was to take them back to town, and last of all came Master Dunton.

But just as he was about to say good-bye, he was grabbed by two sailors, quickly divested of his shirt and doublet, and led to a plank which had been run out over the vessel's side, and there, while his colleagues looked on helplessly from below, they laid on his bare back thirty-nine stripes of the cat o' nine tails.

Dunton stood his flogging bravely, and when it was over he crawled down into the rowboat as fast as he could. John Carter had not spoken, but after Dunton had reached the boat he called down to him, "I swear

Dunton, if you'd only owned up that you'd kissed your wife I'd have let you off."

But Dunton did not answer. He was putting on his shirt at the moment, and under such circumstances no man could make a dignified reply.

The frigate now had come up to the wind, and the sailors cast the rowboat adrift. As the distance between them rapidly widened, Mollie came on deck and the Puritans saw John deliberately kiss her several times, and

they heard him call out to them, "I say, Dunton, change that law of yours, will you, and flogg the man who doesn't kiss his wife."

Nobody answered him, and by the time the indignant Puritans had reached the shore, the Eagle with her great wings spread out to the wind had passed between the islands and was speeding away toward the high seas beyond the jurisdiction of the Province of Massachusetts Bay.

AN EPISODE IN MADISON'S CAREER.

BY MARIA NEWTON MARSHALL.

It is not likely that the course of lectures delivered by Dr. John Fiske at the Berkeley Lyceum, New York City, in the winter of 1897, can have been excelled by any since delivered, even by himself. And the lecture which closed the series, upon "The Progress of Liberal Thought in America," must have drawn toward him the heart of every Virginian in his audience, in its eulogy of Madison of illustrious memory.

"It was Madison's act in Virginia," said he, "that was the cause of the beginning of all freedom of thought in recent times. This act was translated into many languages, and its provisions were followed by one State after another. Massachusetts was the colony founded upon the most illiberal principles, and was the narrowest and most fanatical of all the States. Now, it is safe to say that from that State have emanated the most liberal religious views in the United States."

In our own untroubled times, when church rule and state rule are happily independent of each other—or, more properly speaking, the independent government of which is as distinctive as its individual sphere—it is hard for us to understand how a hundred and more years ago their claims were so antagonistic and their animosity so bitter. Yet there was

indeed a time, when, blackest of the clouds that overhung our troubled land was the black cloud of religious strife—a contradiction in terms, indeed, if by "religion" we mean the kernel and not the shell of our belief. And it was over Virginia—ever fated to suffer as well as to triumph—that the storm first burst furiously.

The strife between the Non-conformists and those who favored the union of church and State was bitter and long. Chief among the army of Dissenters in Virginia were the Baptists, whose first church in this State was established in 1760, followed shortly by others, in Orange, Spottsylvania, and the neighboring counties. The clergy tried in vain to put down the new sect, and the civil authorities went so far as to imprison and otherwise persecute the aliens, as they were looked upon. Prominent among the leaders of the new church were the Reverends Waller, Craig and Childs, who were at one time confined in the jail at Fredericksburg, but whose zeal was so great that they preached through the barred windows to the throngs that gathered daily to hear them. History tells us, furthermore, of one James Read of North Carolina, who claimed to have had a vision, and to have been directed by a heavenly voice

to Virginia, there to proclaim his doctrine. He accordingly set out, and reached the county of Orange, where soon great crowds flocked to hear him. In that county, also, there was a Baptist minister, known as Parson Leland, whose eloquence and untiring efforts in behalf of his creed had won for him great notoriety and a wide influence. He was for a time imprisoned at Culpepper, and, it is said, attributed his incarceration to Madison himself, who was shortly afterwards a candidate from his district to the Virginia Convention, which, it will be remembered, met at Richmond, in 1788, to decide upon the rejection or adoption of the Constitution of the United States, recently framed in Philadelphia.

Now, if it be borne in mind what a tremendous struggle awaited Madison as leader of the party in favor of the ratification of the Federal Constitution, when arrayed against him were men as great as himself and as ardently patriotic, — such men, indeed, as Patrick Henry, George Mason and James Monroe, — one need not wonder at the violence of the opposition that spared no effort to defeat him in the election to the Convention of Virginia. And if it be further remembered that to indorse the Constitution seemed to the minds of many but a return to a monarchical form of government, and but the substitution of the church of America for the church of England — a distinction without a difference — one may readily appreciate the consternation of the Non-conformists, and their frenzied resistance to an instrument which, as it seemed to them, threatened the overthrow of their rights, civil and religious.

These facts recall an incident at this stage of Madison's career, of undoubted authenticity, and familiar to many of the older residents of Orange County, who have gathered, as is their privilege, from that period which is their own past and was Madison's future, many a bit of his personal history so far unchronicled. The writer gives the incident as related to her by her father, himself an

octogenarian, — and by his friend and contemporary, a native and life-long resident of Orange County. There still stands at Gum Spring, near Unionville, Orange County, Virginia, an old oak tree, which may not inappropriately be styled the "Charter Oak of Virginia," since beneath its spreading branches was enacted a scene which virtually, if not officially, made Virginia the arbiter of her own fortunes and of those of her sister-states. For, on this spot, upon a summer's day, it chanced that Madison, — while as yet his election to the Convention was at the mercy of circumstance, — met, as good luck would have it, the man whose hydra-headed influence he had combated at every turn, and whose ill-will he had gained and had reason to fear, and whom he knew he would do well to propitiate, — no other than Parson Leland himself. At once the two fell into argument, — by one consent withdrawing into the cool shadows of the friendly oak — Madison, the man of destiny, and the Baptist preacher, Parson Leland, whose influence in the Anti-Convention party was very great, and whose fervid eloquence had won to his cause many an adherent, and to which Madison himself now listened, no longer wondering at its power over the minds brought under its sway.

Earnestly and effectually, Madison (who, like Washington, was not an orator, yet of comprehension so clear and conviction so strong that all who heard him must feel the force of his terse sentences), met and overcame the arguments of his opponent. Invincible reasoning and eloquent appeal were well met in these two, who, throughout the long and impassioned debate, were scarcely conscious of the fact that many listeners had gathered around them as the hours slipped by unheeded. It is avouched that so clearly were Madison's views set forth on this occasion; so palpably honest and sincere his advocacy of the cause he had at heart, and which he believed to be the haven of safety to his beloved but divided country; and so conspicuous the absence of personal ends in

the issue he was striving to bring about, that the man before him argued, listened, wavered, and finally stood silent, his weapons having been broken, one by one, by the iron grasp that met them; and before the sun set that day, the adversary had withdrawn his opposition; while the crowd surrounding the disputants (supporters, for the most part, of the opposing faction), if not won over, at least was neutralized to an extent that attested Madison's power in debate. Quietly, as the late contestants shook hands, the gathering dispersed; and soon the noble oak, a silent witness of one of those momentous, if quiet struggles which Destiny makes use of to shape a Nation's course, stood serene and benign, alone.

Upon this event, unremarkable in itself, and almost unknown to history, rests the security of our Nation to-day,—so true it is that from the acorn small the mighty oak doth grow! For had it not been for this personal victory, how much greater the odds against Madison, who was *all but* defeated in the election to the Virginia Convention; and who, in the agitation of the vital question of Virginia's ratification of the Constitution, during a session of over three weeks, by unrelenting and almost superhuman effort, fighting, step by step, the well-nigh irresistible power intended to crush him, won the day, indeed, but escaped defeat by a hair's breadth!

And so it was that Virginia, by the might of one man as it were,¹ took her stand for the

¹ "Fortunate it was, for the honor of Virginia and the good of the nation, that James Madison, as the father and special champion of that instrument (the Federal Constitution), in that body (the Convention of Virginia), had the support of so able a colleague as John Marshall in warding off the arguments of Patrick Henry and others, who were bitterly opposed to such ratification. Although Marshall was at the time less than 33 years of age, he made three masterly arguments in support of the clauses of the Constitution which were most severely assailed, authorizing federal taxation and the collection of revenue, the ordaining and establishing of a federal judiciary and the powers therein given to Congress and the President over the militia. Without those arguments the instrument might have been rejected by Virginia, since, as it

Constitution. Who but such a leader could have placed Virginia where she stood, where she stands? And without Virginia's example, what one of the States would have taken the stand she took? And without the Constitution, in whose firm grasp Virginia and her sister States laid each her hand, where would be the United States of America to-day? And if not to the United States, to what nation upon the earth can we look for that broad spirit of tolerance which "makes the whole world kin?"

It is not too much to say that Madison, though firm in his allegiance to the church of his fathers, was none the less ready to respect in another that adherence to principle, and honest belief, manfully maintained, so characteristic of himself, though directed in a different channel. And who shall say that the parson's passionate argument in behalf of his own religious views, that day under the oak, did not bear fruit in the aftertime, when Madison's name became the synonym of liberal thought, and freedom of religious sentiment the wide world over? Surely, greenest among the garlands that loving hands may bring to lay upon the quiet grave among the Montpelier hills, is the recognition of that broad catholicity of which Madison was the promoter, and which has spread beyond the bounds of our own fair land, and would fain clasp hands around the world.

* * * * *

A few years ago, the writer's father, in company with a friend, visited Gum Spring, whose sole object of interest to the traveler is the fine old oak, which, once upon a time, more than a century ago, sheltered one of Virginia's greatest sons. These gentlemen brought home a small branch of the tree, which the former shortly afterwards carried with him to New York, and presented, with the bit of history here related, to the New York Historical Society.

was, it was only ratified by a vote of 89 to 79." Extract from a lecture on "John Scott and John Marshall," by John B. Cassoday, Chief Justice of the Supreme Court of Wisconsin.

THE COURT OF APPEALS OF KENTUCKY.

I.

BY JOHN C. DOOLAN OF THE LOUISVILLE, KY. BAR.

THE State of Kentucky, since its admission into the Union on June 1, 1792, has had four Constitutions. In each of them is made the usual distribution of the powers of government into three departments—legislative, executive and judicial—and each department is prohibited from encroaching upon the rights or powers of the others.

Each Constitution has provided that the supreme judicial power of the commonwealth (except in cases of impeachment) shall be vested in one Supreme Court, "to be styled the Court of Appeals."

The general functions and powers of this court have been the same throughout its existence, but radical changes have been made in the manner of selecting its members. A review of these changes will therefore be of interest in sketching the history of the court.

The first Constitution, adopted in 1792, by a singular anomaly made the "Court of Appeals" a court of *original* jurisdiction in certain land suits arising under Virginia land grants. This burdensome jurisdiction was taken away by the second Constitution, adopted in 1799. In other essential respects

the first and second Constitutions of the State, so far as they bear directly on the Court of Appeals, are substantially similar. It was provided in both that the judges should be appointed by the governor by and with the advice and consent of the senate, and they

should hold their offices during life or good behavior. This tenure was, however, subject to the right of removal by impeachment in the usual way, or by the governor upon address by two thirds of the members of each house of the general assembly. While the court itself was *established* by the Constitution, its *organization* was left to the legislature. The number of judges was not fixed, and so during the life of the second Constitution we find the court composed sometimes of three and sometimes of four judges.

One member of the court was specially

commissioned as chief justice; the others as associate judges. Among the associates for a long time a numerical rank was maintained, but this was finally abolished.

This power of the legislature in the organization of the court gave rise eventually to grave troubles. As elsewhere detailed,



THOMAS TODD.

in 1824 a bare majority of the two houses of the legislature, being dissatisfied with some decisions of the court and being without the power to remove the judges, passed a bill to repeal the act organizing the court, and immediately sought to reorganize another court, to be made up of different judges. The governor of the State lent his active aid to the scheme. This brought on a violent struggle that rent the State into two factions, known respectively as the "Old Court" and "New Court" parties.

After a struggle of several years, the "Old Court" party triumphed, but the "New Court" adherents, allying themselves with the Democratic party, eventually secured the adoption in 1850 of a third Constitution that materially changed the tenure of office and the mode of election of the judiciary. It was said by men of that day that the "New Court" party had "made a bill of sale of itself to the Democrats."

It is a fact that most of "New Court" men were followers of Andrew Jackson (two of them were in his cabinet), while the "Old Court" party numbered among its adherents mainly those who belonged to the Whig party and supported Henry Clay in his aspirations. In the course of time the Whigs declined in power, both in the State and throughout the country, and when the Democrats finally gained the ascendancy in Kentucky, there came the Constitution of 1850.

It would be extremely interesting, if time or space permitted, to watch these sidelights on the drama of national politics as produced on the miniature stage of Kentucky.

In 1849, the third Constitutional Convention of the State assembled in Frankfort. It had been called, in fact, by the friends of slavery for the purpose of absolutely fastening that system upon the State, but when it assembled it was found that most of the members were in sympathy with some proposed radical changes in the judiciary.

With one dissenting vote (that of Garrett Davis, afterwards United States senator, who

left the convention rather than sign a Constitution providing for an elective judiciary), the third Constitution was submitted to the people of the State, and was by them in 1850 ratified by a large vote. It was promulgated on June 11, 1850, and went into full effect in 1851.

By its terms the Court of Appeals was established to consist of four judges to be elected by popular vote—one from each of four districts in the State. The term of office of the judges was fixed at eight years, except that those first chosen would hold their offices for terms of two, four, six and eight years respectively, to be determined by lot among them. Thus an election for at least one judge of the court was provided for every two years. The judge having the shortest time to serve became chief justice of the court. The right of removal by impeachment or address was retained as in the former Constitutions.

When this third Constitution was submitted to the people it was violently opposed by many, chiefly because of the elective judiciary feature. Others favored its adoption for that very reason, as many of the inferior judges had exposed themselves to just censure upon charges of nepotism and arbitrary conduct. The proslavery features of the new instrument and the support of nearly all the leading Democrats overcame all opposition, and it was ratified by a large vote.

For the first twenty-five years under the Constitution of 1850, the people were so occupied with the questions leading up to the Civil War and the problems that grew out of it, that the mode of selecting judges caused less comment than would have otherwise resulted. At the end of that period the people had grown so accustomed to electing their judges that all thoughts of choosing them in a different way came to be considered as chimerical. It was generally considered that the voters of the State would not give up a privilege which they had exercised so long. Accordingly when another Consti-

tutional Convention met in 1890, there was some debate as to an appointive judiciary, but the feasibility of such a plan was doubted and the system of electing judges by popular vote was continued in force.

By the Constitution which was framed by this Convention and which went into effect on September 28, 1891, a Court of Appeals is established to consist of not less than five and not more than seven judges. The judges are to be chosen by districts laid off by the legislature for terms of eight years and the judge of the court longest in commission is styled chief justice.

By authority of the Constitution, the legislature has provided that the court shall consist of seven judges and it now sits in two separate divisions, each of which is composed of the chief justice and three of his associates.

Though somewhat outside the scope of this article, it seems not improper to suggest that the independence of the judiciary is more certainly attained by lengthening their terms of office and thus doing away with so frequent campaigns on the part of the judges. Party nominations for judicial offices should be prohibited. Then again freedom from local influence and a broader judicial development are better secured by requiring judges to be voted for by the State at large instead of by a limited district. A similar plan in municipal affairs has been tried with success where the members of local legislative bodies are required to reside in the wards or districts from which they are chosen but are to be voted for by the whole municipality.

This general view of the organization of the Kentucky Court of Appeals brings us to a sketch of some of the eminent men who have sat in that court. It would be hard in many cases to decide which of them has the higher right to be remembered for his public services and that question shall be avoided in this review by adhering to the maxim, "*Qui prior est tempore, potior est jure.*"

Without making invidious distinctions it is the plan of the writer to offer a brief sketch of each chief justice of the court and also sketches of such associate judges as by their long service and eminent qualifications have given to Kentucky's Court of Appeals its reputation at home and abroad.

HARRY INNES.

On June 28, 1792, Governor Isaac Shelby appointed the members of the first Court of Appeals of Kentucky. Judge Harry Innes was first commissioned by him as chief justice of the court and Benjamin Sebastian and Caleb Wallace as associate judges. Judge Innes declined the appointment but his relations with the other members of the court and his prominence in the affairs of the State make it proper that he be mentioned in this connection.

He was born in Virginia in 1752. When only thirty-one years of age he was elected by the legislature of that State a judge of the Supreme Court for what was then the District of Kentucky. He enjoyed the personal friendship of President Washington who repeatedly honored him with important trusts and made him the first judge of the United States District Court for the District of Kentucky.

He was holding this position when Governor Shelby, also his close personal friend, appointed him first chief justice of the newly formed State. Thus to him was given the honor of standing at the head of two lines of illustrious men, who have respectively filled the positions of chief justice of the Kentucky Court of Appeals and of judge of the United States District Court for the District of Kentucky.

An historical sketch, however brief, should be as accurate as possible. Those who have studied the history of the Mississippi Valley during the closing years of the last century, will recall the efforts made by Spain to obtain control of the Mississippi river or at least the right of navigating it. Its success in its

plans would have placed the entire country west of the Alleghenies completely at the mercy of a foreign power.

The thirteen original States seemed indifferent to the fate of the struggling young commonwealth of Kentucky and it was left to protect itself from the obvious dangers of Indian warfare and the insidious wiles of Spanish diplomats who sought to detach its citizens from their loyalty to the United States. It was proposed that Kentucky and the Northwest Territory (now comprising Ohio, Indiana, Illinois, Michigan and Wisconsin) should withdraw from the Union and establish a new empire or republic west of the mountains, in alliance with the Spanish Crown which undertook to defend them against attacks from the Indians and the British.

The scheme proved very inviting to many ambitious men and to some patriots as well. It would be out of place here to record the names of those who abetted this "Spanish Conspiracy" as it is now called but suffice it to say that Benjamin Sebastian, one of the first judges of the Kentucky Court of Appeals was accused of being a paid emissary of Spain while holding his high judicial position. The charge was investigated by the legislature and Sebastian was proven guilty. In disgrace he resigned his office to avoid impeachment.

The same legislature passed resolutions asking congress to investigate Judge Innes, who was a friend and supposed adviser of Sebastian. The investigation was had. It resulted in the acquittal of Judge Innes and the "incident was closed." For ten years more until his death in 1816 he served on the bench of the Federal Court and further criticism was silenced, though many yet suspected him of "guilty knowledge." The story of the whole affair is as long as it is interesting but any attempt to further vindicate Judge Innes from these unproven charges would be a needless and unprofitable digression

GEORGE MUTER.

While Judge Innes was the first appointee George Muter was in fact the first chief justice of the Kentucky Court of Appeals. He had been the first chief justice of the Supreme Court, established by Virginia for the district of Kentucky before its erection into a separate State, and on December 7, 1792, he was by Governor Shelby commissioned chief justice of the new State in lieu of Judge Innes who had declined the honor.

Judge Muter accepted the appointment, and though quite old and infirm he continued to preside over the court until December, 1806, when he resigned.

During the period of his service he was absolutely untainted by any suspicion of disloyalty to his country and that too at a time when disloyalty had, if possible, some mitigating features. He was closely associated with Col. Thomas Marshall, father of the famous Chief Justice John Marshall, in exposing and breaking down the dangerous "Spanish Conspiracy" already mentioned. He was one of the original subscribers to the fund for founding Transylvania University.

While on the bench, Judge Muter did much to clear away the confusion incident to the settlement of a new country where inaccurate surveys and defective registration laws had brought countless disputes in their train. In his honest efforts to discharge his duty, he aroused some enmities and in the winter of 1794-1795, he and a colleague incurred the displeasure of the legislature which sought to address them out of office. "Their crime," says one historian "was a decision in an important land suit, flagrantly illegal and which would have been most mischievous in its consequences if adhered to." The attempt failed and for twelve years more Judge Muter held his office without further assault upon his reputation or his official position.

He resigned as chief justice in 1806 with the understanding, or rather promise, that, as he had given nearly all of his life to the ser-

vice of his people at a meager salary, he should have a pension for the rest of his days. He had yet to learn that republics are ungrateful. After two years his pension was stopped because the legislature thought "it savored of monarchy" and Judge Muter in his penniless old age was obliged to accept the bounty of his successor and warm friend, Thomas Todd, then became associate justice of the United States Supreme Court. He lived in Judge Todd's family and richly did he at last repay them. After his death some claims which he had against the United States Government were paid and Judge Todd's family as his sole legatees thus received a handsome fortune.

THOMAS TODD.

The second chief justice to preside over the Kentucky Court of Appeals was Thomas Todd, best known as a justice of the United States Supreme Court.

Judge Todd's service on the bench of the Kentucky court covered a period of a little more than five years, though he was chief justice for only a few months of that time.

He was first commissioned associate justice of the court on December 19, 1801. An act had just been passed increasing the number of judges in the court from three to four. Chief Justice Muter and his associates were growing old and it was generally understood that the purpose of the act was the infusion of new blood by the introduction of a young man into the court. Judge Todd was then thirty-six years of age. He had previously been clerk of all the numerous conventions that had met to frame a Constitution and organize a government for the new State. He was the first clerk of the Court of Appeals. As a mere youth, he had served with distinction in the Revolutionary War.

When Chief Justice Muter resigned, Judge Todd was on December 13, 1806, appointed to succeed him. His term of office as chief justice, however, was brief, for in April, 1807, President Jefferson made him asso-

ciate justice of the United States Supreme Court.

This appointment came to him entirely unsought and under the circumstances no higher compliment could be paid to any man. He was either the first or the second choice of every member of each house of congress.

His contributions to jurisprudence abundantly appear in the reports of Kentucky and of the United States Supreme Court. In his career as a jurist, he fully merited the exalted tribute paid him by his intimate personal friend, Justice Story, who said of him: "His death was deemed by his associates a great public calamity and in the memory of those who survive him, his name has ever been cherished with a warm and affectionate remembrance."

FELIX GRUNDY.

The appointment of Chief Justice Todd to a seat on the Supreme Court bench, occasioned a vacancy which was at once filled by the promotion of Judge Felix Grundy from the position of associate justice, to which he had been appointed on December 10, 1806.

Coming into the chief justiceship on April 11, 1807, when less than thirty years old, Chief Justice Grundy remained a member of the court only a few months.

He resigned in January, 1808, and removed to Nashville. From that time his life was a part of the history of Tennessee. He was a zealous Democrat and a warm friend of General Andrew Jackson. He served the people of his newly adopted State in the state legislature and in both houses of congress.

For two years, he was Attorney General of the United States under President Van Buren. He resigned that position to again take his seat in the United States senate, but died before doing so. He was a brilliant man but his fame was forensic rather than judicial.

NINIAN EDWARDS.

The soil of Kentucky has always been prolific ground for statesmen, as abundantly attested by the numerous governors, senators and prominent public men she has given to other States.

Like his predecessor, Chief Justice Grundy, the history of Ninian Edwards belongs mainly to another State. He was born in Maryland in 1775, and came to Kentucky in 1794, to take charge of his father's estate in Nelson county. In his early life he had the then unusual misfortune of wealth, which induced in him a life of dissipation and extravagance. His strong native force of will enabled him, however, to break off from his evil associations and habits, and from the age of twenty-two his rise in the public life of the new commonwealth was rapid.

On December 13, 1806, he was commissioned associate justice of the Kentucky Court of Appeals. He was then thirty-one years of age. Upon the resignation of Chief Justice Grundy, Judge Edwards was, on January 5, 1808, appointed to succeed him. He continued to preside over the court until May, 1809, when he resigned to become the first governor of the Territory of Illinois by appointment of President Madison.

His services to his country, and to the State of Illinois, render him conspicuous for statesmanship and foresight.

ROBERT TRIMBLE.

The subject of this sketch was born in 1776, in Berkeley county, Virginia, now West Virginia. In 1779, his father removed with his family to Kentucky, where the future jurist grew to manhood among the hardy pioneers of that region. His educational advantages were of necessity very limited, but he made the best possible use of such opportunities as were afforded him. Even at that early day the bar of Kentucky had attracted to its ranks much of the best native talent of the country, and Robert Trimble was fired with an ambition to succeed at the law.

He took up the study of the profession under two of the most distinguished lawyers of the State, and in 1803 he was admitted to practice. Four years later he was appointed a judge of the Court of Appeals, receiving his commission on April 13, 1807. This position he resigned in March, 1809, because the meager salary of a

judge was not adequate to the needs of his family. For the same reason he declined in 1810 appointment as chief justice of the court.

He had a great aversion to purely political office, and twice declined election to the United States senate.

In 1813, he was made United States district attorney for the district of Kentucky, and in 1816, President Madison appointed



ROBERT TRIMBLE.

him judge of the United States District Court for Kentucky.

This position was in entire accord with his tastes, and he discharged its duties most acceptably until May 9, 1826, when President John Quincy Adams appointed him associate justice of the United States Supreme Court. This office he filled with great satisfaction to his associates and to the country at large until his death, which occurred all too soon on August 25, 1828. After his death a county in Kentucky was named in his honor.

The writer of Justice Trimble's biography, as contained in volume 1 of the Digest of the United States Supreme Court Reports issued by the Lawyers' Co-operative Publishing Company, has very justly said of him: "Perhaps no associate justice of the Supreme Court of the United States, occupying the position for so short a time, placed the result of his labors in so conspicuous a form as Robert Trimble. A greater proportion of the opinions written by Justice Trimble have formed the foundation upon which either to originate or support later rulings of the court, than those prepared by any other justice."

It was Justice Trimble who, in *Montgomery v. Hernandez*, 12 Wheaton, 129, first defined with precision "the federal question" that must be raised by a litigant who seeks a writ of error from the Supreme Court to a state court, and showed that the plaintiff in error must have claimed the right in the state court. This is the basis of a long line of cases continually recurring in the reports.

Collins's History of Kentucky says of him: "As a judge of the highest state court he had no superior in diligence, learning, ability and uprightness, and on being transferred to the supreme tribunal of the nation, both Chief Justice Marshall and Judge Story pronounced him not only a lawyer of the first order but also one of the most improvable men they had ever known.

. . . . But his private virtues and his simple noble nature shed a lustre upon his name above all that which was derived from great intellect, ripe attainments and high station."

GEORGE M. BIBB.

The resignation of Ninian Edwards as chief justice in May, 1809, made room for the promotion of George M. Bibb to that position.

Judge Bibb had been appointed, on January 31, 1808, associate justice of the court. On May 30, 1809, he was made chief justice, and he held that place until March, 1810, when he resigned, and John Boyle was appointed to succeed him. Upon the resignation of Chief Justice Boyle, Judge Bibb, on January 5, 1827, was for the second time commissioned chief justice of the court, holding the position this time until December 23, 1828, when he again resigned.

With the advent of Judge Bibb into the Kentucky Court of Appeals, the fame of that court began. The bench and the bar of the State alike for many years bore the stamp and impress of his greatness.

When at the bar he contended with foes worthy of his steel, and few were the opponents whom he could not by his dexterous thrusts unhorse. When on the bench his opinions were models of concise and cogent reasoning, impartial justice and profound knowledge of the law.

His briefs and his decisions show him to have been a man of wide research in all fields of knowledge. Especially did he seem familiar with the reports of adjudged cases, both in this country and in England. In this connection it may be of interest to note that in the early history of the State an act was passed in obedience to popular prejudice against England, which prohibited any one "from reading or citing in any case all the reports of England since July 4, 1776." It has been well said that such an offense would hurt the courts infinitely more than it would help the British.

Judge Bibb expressed his own views of the standard a judge should have before him in these words taken from the dedication of the first volume of his reports :

"Judges should be learned, in theory and in practice—in abstract principles and in matters of fact—in books of letters and in the book of human nature—in morality and in the ways of men and their modes of transacting business. They should be of an independent cast of mind and of solid integrity. . . . When judges are studious out of court, diligent in court and capable of imparting information to the bar, lawyers will speak less from choice or compulsion, justice will be administered without favor or affection to the poor and to the rich, order and the reign of laws will be established and equal liberty and general confidence in the rights of property and of industry will be the necessary consequence."

Judge Bibb was born in Prince Edward County, Virginia, in 1776. He was the son of Richard Bibb, a gentleman of wealth who had been educated for the Episcopal ministry. His father had two brothers one of whom removed to Alabama and the other to Georgia. Each became governor of the State of his adoption and also United States senator and each State has a county named for them.

In his youth, George M. Bibb had rare opportunities of pursuing his studies. He was a graduate of Hampden-Sidney College

and also of William and Mary College, the two oldest institutions of learning in Virginia. Having taken up the study of the law, he removed with his father in 1799 to Kentucky and he finally located in Frankfort for the practice of his profession.

The time of his coming to Kentucky was most auspicious. The dangers that hourly threatened the pioneers of the State had for the most part been dispelled and the wonder-

ful resources of the new western commonwealth attracted to its borders the best young talent of the east. These formed the bone and sinew of Kentucky's greatness and gave to its early civilization both chivalry and power.

For fifty years after he came to Kentucky, no State in the Union could boast of abler lawyers or more accomplished jurists. The enduring value of his own labors is attested to this day by the courts of every State.

In 1815 he was appointed first official reporter of the Court of Appeals. Until then no systematic attempt had been made to report the decisions of that tribunal, although three volumes of reports had been issued by private enterprise. Judge Bibb with his own hand and largely as a labor of love took time from a large practice to edit and publish the four volumes of reports bearing his name. The opinions contained in them cover a period from 1808 to 1817 and are a part of the horn-book law of this country.



GEORGE M. BIBB.

Each time after Judge Bibb resigned the chief justiceship he was elected by the legislature of his State to the United States senate. He resigned his office as senator during his first term but served out his last term. At its expiration in 1835, he was made first chancellor of the Louisville Chancery Court, in many respects the most important court of original jurisdiction in the State.

Here again, the selection of Judge Bibb made for that court an exalted standard of fitness for judicial position, as evidenced by the line of able, honest and fearless judges who have since presided there.

In 1844 he resigned the chancellorship, to accept the post of secretary of the treasury under President Tyler. When the term of President Tyler expired in 1845, he took up the practice of law in the courts of the District of Columbia, where he continued to reside until his death in 1859. During a great part of this time, he was engaged with his friend Attorney General John J. Crittenden in the department of justice, holding the position now filled by the first assistant attorney general.

During the last years of his life, such was the respect in which he was held by the Supreme Court of the United States, that he was permitted to make his arguments before that tribunal while sitting in his chair. His mind remained clear and active until his death on April 14, 1859, in the eighty-third year of his age. The newspapers of that day report that his funeral was attended by the president and his cabinet, the Supreme Court and both houses of congress.

In his private life Judge Bibb was typical of the 18th century gentleman of culture. He never adopted the modern style of dress but to the last clung to knee breeches, silk stockings and slippers with large silver buckles as the costume befitting a gentleman. The accompanying photograph made from a portrait by Jouett, now in the possession of his granddaughter Miss Patty A. Burnley at

Frankfort, Ky., shows the type of man that he was.

Judge Bibb was a representative of the "Old School" not simply in his dress but in his tastes as well. He was an expert fisherman and his gardens were a source of great pride to him. The famous "Bibb Lettuce" was originated by him and he was as punctilious as Washington himself about all the affairs of his domestic life.

He was twice married and sixteen children were born to him of the two marriages.

If space permitted, it would be highly profitable to notice some of the contests in which Judge Bibb engaged both in court and out of it. He took the keenest interest in public affairs and was one of the most active and able advocates of the "new court" in the controversy that shook the State in the decade beginning in 1820. Though he had for his contemporaries the greatest statesmen of our history and often measured lances at the bar with Clay, Hardin, Wickliffe, Rowan and many others, it is safe to say that none fared better in the contest and none has left a more lasting impress on the jurisprudence of the State of Kentucky.

JOHN BOYLE.

The sixth chief justice of the Kentucky Court of Appeals was John Boyle. Collins' History tells us that he "was born of humble parentage October 28, 1774, in Virginia," and at the age of five years he was brought with his father's family to Kentucky. Like Justice Trimble, his opportunities for obtaining an education were at that time in Kentucky necessarily very limited, but his opinions while on the bench show that he had fully possessed himself of those qualities which Chief Justice Bibb declared essential in a judge. Measured by every standard of judicial fitness, he stood preëminent.

Nor was his fame alone judicial. In 1802, when less than twenty-eight years of age, he was unanimously elected to the lower house

of congress. He was twice re-elected, each time without opposition, and he declined to stand for further election.

Presidents Jefferson and Madison repeatedly tendered him important Federal positions but his love of quiet life and aversion to political office impelled him to decline them.

In 1808, President Madison offered to make him first Governor of Illinois but he refused the honor and the place was given to Ninian Edwards.

On April 1, 1809, he was appointed associate justice of the Kentucky Court of Appeals. This position was congenial to his tastes and he at once accepted it. On March 20, 1810, he was commissioned chief justice to succeed George M. Bibb and he presided over the court until November 8, 1826, when he resigned.

Immediately upon his resignation, he was made judge of the United States

District Court for Kentucky, succeeding Robert Trimble who had been appointed to a place on the Supreme Bench.

Chief Justice Boyle was an able jurist as the official reports of his court from 1st Bibb to 3d T. B. Monroe abundantly prove. His opinions to-day are of the highest authority in the courts of Kentucky and only in rare instances have they after seventy-five years been modified or overruled. He was the first judge of any "back-woods" court whose opinions were ever cited in Westminster

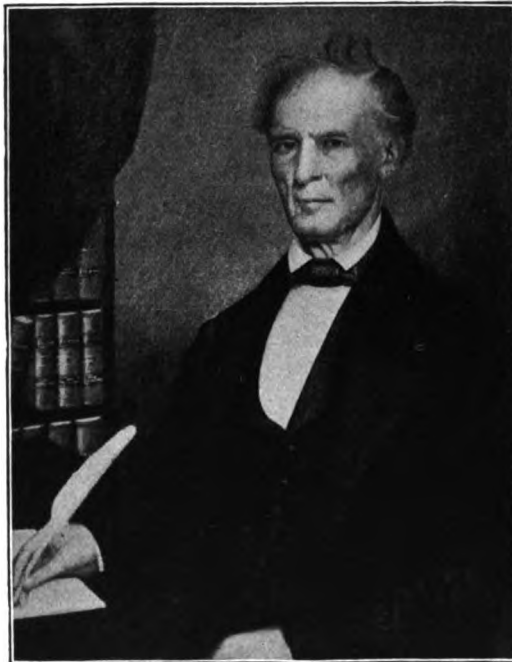
Hall a tribute that speaks volumes of praise. To wisdom of decision and absolute integrity of purpose, he added a firmness of character that made him a tower of strength to his court and made the court the very bulwark of constitutional government in Kentucky. In an article published in the "Green Bag" in April, 1899, the writer undertook to give an account of what is known in Kentucky as the "Old Court—New Court

Controversy." During the excitement of that conflict, when the executive and the legislative departments united in open attack upon the judiciary, Chief Justice Boyle with his associates, Judges Owsley and Mills, stood four square to every assault and declined to surrender one jot or tittle of the rights secured to the court and to the people by the Constitution.

It is related of Chief Justice Boyle that during this conflict, Henry Clay whose sympathies were with the "Old

Court" came to him with a proposition to compromise with the "New Court" partisans. The proposal roused the judge's wrath and he turned on the "Great Pacifier" with an oath telling him that he considered such a measure disgraceful and though he valued his friendship highly, he would treat it as broken if the proposition was ever repeated. It was never repeated.

The final vindication of the "Old Court" was a memorable triumph of law and constitutional liberty as well. Not until that



WILLIAM OWSLEY.

vindication was had could any one of the judges be induced to resign, but after the storm had abated, Chief Justice Boyle to the great regret of lawyers and judges throughout the State retired from the court in November, 1826. His associates Judges Owsley and Mills resigned on the same day in December, 1828.

Chief Justice Boyle died in 1834 and after his death the legislature organized a new county in the central portion of the State and named it in his honor. So great was his modesty that notwithstanding his eminent services in the Kentucky Court of Appeals, he declined to enter a wider field of usefulness. He twice refused appointment as associate justice of the United States Supreme Court, once as successor of Justice Thomas Todd and once as successor of Justice Robert Trimble.

In his domestic life he was specially blessed. When in his twenty-third year, he married Elizabeth Tilford and the young couple went to house keeping in a small buckeye log house of two rooms which they built near Lancaster, Kentucky.

This house had a most remarkable history. Its first occupant was John Boyle who was three times elected to congress, serving from 1803 to 1809, declining a fourth election and then becoming chief justice of Court of Appeals.

Samuel McKee next began housekeeping in the same house and he succeeded Boyle in congress serving from 1809 to 1817.

George Robertson next began housekeeping in the same house and he succeeded McKee in congress, being elected to serve from 1817 to 1823, but declining the last term and subsequently becoming chief justice of the Court of Appeals.

Finally Robert P. Letcher began housekeeping in the same house and he was five times elected to congress, serving from 1823 to 1833, and later he was elected Governor of the State from 1840 to 1844.

It is a matter of regret that so far as known

there is no picture of Chief Justice Boyle in existence. For many years a portrait of him hung in the Boyle County Court House at Danville, Kentucky, but it was destroyed or lost in a fire in 1858.

The judicial career of Chief Justice Boyle is so closely blended with that of his associates, Judges Owsley and Mills, that it would be unjust to omit mention of them, though no extended review of their lives can here be given. Many of the opinions of the court are given simply "per curiam," such was the unity of sentiment and expression in that tribunal.

One of the most notable of their decisions is the case of *Amy* (a woman of color) v. *Smith*, decided June 19, 1822, and reported in 1 Littell, 326. This case was the forerunner of the "Dred Scott" decision made about thirty-five years later. In an elaborate opinion the Kentucky court held that a negro could not, under the Constitution of the United States, become a citizen of any State. The case is an interesting one, and is well worth the reading.

The courage of the court, in holding certain acts of the legislature for the relief of delinquent debtors unconstitutional and void, marks an epoch in the history of the State judiciary to which all its citizens to this day point with pride. Despite numerous threats of popular vengeance the three judges boldly delivered separate opinions concurring in the result. The private lives of these men were in keeping with the public record made by them. In December, 1828, Judges Owsley and Mills resigned their offices. Governor Metcalfe immediately reappointed them, but the senate failed to confirm the nominations because of a lingering belief that good feeling would be sooner restored throughout the State by the selection of other judges.

Thereupon they both retired to private life and subsequently took up the practice of law. Judge Mills soon died of an apoplectic stroke on December 6, 1831, but Judge Owsley survived to the ripe old age

of eighty years, and died on December 9, 1862. In 1844, he was again honored by the people of the State by being elected governor on the Whig ticket over one of the most popular men in the Democratic

party. An evidence of the returning good will of the people had been given the preceding year, when a new county in the southeastern part of the State had been organized and named for him.

THE CALENDAR OF SCOTTISH CRIME.

II.

FEW events in Scottish history have been the subject of warmer discussion than the Earl of Gowrie's conspiracy against the life of James VI., and its leading features are so well known to all who have devoted any attention to that monarch's reign, that anything more than a passing notice thereof may seem superfluous. Yet Mr. Pitcairn brought together such a large number of documents bearing on this remarkable tragedy, presenting it for the first time in successive scenes described by eyewitnesses, that it is difficult to resist the temptation to run over the chief points in the exciting story,—all the more so, perhaps, because it exhibits James VI., usually remembered as a somewhat pusillanimous pedant, in the light of an athlete and a man of spirit.

The drama opens in the park of Falkland Palace, between six and seven o'clock on the bright morning of August 5, 1600. The huntsmen and hounds are on the green; the courtiers are waiting to mount till his majesty puts his foot in the stirrup; even the details of their clothing are known to us, from the payments entered in the treasurer's accounts in July, such as— for green cloth to make hunting dresses for the king and his suite, gold and silver lace to trim the same, and some stuff to "lyne the breikis of Robert Ker, the paige of honour." We learn that it was one of the finest days in the year, and that his majesty was impatient to be in pursuit of a

fine buck that was harboured near at hand. It was the realization of the well known vision in Tennyson's "Palace of Art:"

For some were hung with arras green and blue,
Showing a gaudy summer morn,
Where, with puff'd cheek, the belted hunter blew
His wreathéd bugle-horn.

Just as the king was about to mount, Alexander Ruthven, the Earl of Gowrie's brother, arrived posthaste from Perth, and craved audience, on most private and urgent affairs. Now, although this Alexander's father, "Greysteill" Gowrie, had been beheaded in 1584 for his share in the raid of Ruthven, James had restored the sons to their honours and estates, and thereafter treated the Ruthvens with great favour and confidence. The king deferred his start till he heard what Ruthven had to say.

It was a curious story. Ruthven told him that late on the previous evening, while "taking the ayre solitarie alone" on the outskirts of Perth, he had encountered a suspicious looking fellow carrying something heavy under his cloak. Ruthven threw open the cloak and found in the man's arms a large pot full of gold coins, and, feeling confident that this was treasure trove, marched the man into the town, bound him, and unknown to anybody, shut him up in a secure place. Then, leaving Perth at four in the morning, he rode straight to report the matter to the king, whom he besought to ride into Perth with

him at once so as to claim his royal rights, before either the Earl of Gowrie or the Town Council of Perth got wind of the matter. The king proposed to send one of his officers with a warrant to deliver the man and the money to the provost and bailies, until the matter could be examined ; but Ruthven was horrified at the idea, assuring his Majesty that either Gowrie or the bailies would render a very bad account of the bullion.

So far the lure was an adroit one, for it roused two of James's ruling passions — curiosity and cupidity. But he would not give up his hunting ; he told Ruthven that he must kill his buck first, and that then, if he continued in the same mind, he would ride with him to Perth. Ruthven, much disgusted with the delay, was obliged to be content, and sent off one of his servants to tell Gowrie to expect the king that afternoon.

The buck proved a stout one ; they hunted him from seven till eleven, and ever when there was a check, Ruthven was at the king's rein, whispering to him about the splendour and quantity of the gold coin. Then, as soon as the buck was slain, he persuaded the king to start at once on his tired horse, directing a fresh one to be sent after him. The Duke of Lennox, the Earl of Mar, and other gentlemen, followed as soon as they got fresh horses. It shows that James had good stuff in him, that he was able to set out on a twenty-mile journey immediately after such a severe chase — a novel illustration of the saw that "Money makes the mare to go."

"Ye can nocht guess," he said gleefully to Lennox as he started, "quhat erand I am ryding for ! I am going to get a poise [hoard] in Perth ; and Maister Alexander Ruthvene hes informit me that he hes fundin ane man that hes ane pitcher full of cunzeit [coined] gold of great sortis."

Arrived within a mile of Perth, Ruthven spurred forward, as he pretended, to tell Gowrie of his Majesty's approach, though Gowrie had in fact been warned of it by his

brother's messenger. The earl and his following met the king on the Inch, and escorted him to Gowrie house.¹ The earl had dined, but dinner was prepared in an inner chamber for the king, while the suite took theirs in the great hall. After the king had dined, Alexander Ruthven offered to take him to the chamber where the captive was confined. Accordingly they passed out, through the end of the hall where the rest were seated at table, up a turnpike stair, through several rooms, Ruthven carefully locking each door behind them, to ensure secrecy, as he explained, through a long gallery into a turret at the extreme west end of the building. Here, to his dismay, the king was confronted, not with a bound captive, but with an armed man standing free and erect. Not a very formidable ruffian, as it turned out, for it was only Mr. Andrew Henderson, Gowrie's chamberlain, who was at his poor wits' end to know why he had been locked into the turret alone for half an hour. "All this tyme," as he testified at the trial, "this deponar, fearand sum ewill to be done, satt bpoun his kneis and prayit to God."

As soon as the king was within the turret, Ruthven clapped his hat on his head, snatched a dagger from Henderson's belt, and held it at the king's breast, crying, "Sir, you must be my prisoner. Remember my father's death !" James seems to have behaved with unwonted coolness and dignity. He protested that he, being but a minor at the time, had not been responsible for the death of the late earl, and that in any case, it behooved Ruthven to speak with him uncovered. Ruthven, strangely abashed, took off his hat, and said he would go and fetch his brother, Gowrie, to deal with the king. Turning to Henderson, he said, "I make you his Majesty's keeper till I come back. See you keep him on your peril !" Then, having made the king pass his word neither to cry out nor open the window in his ab-

¹ Pulled down in 1807 to make way for the prison and county buildings.

sence, he passed out, and locked the door behind him.

Now the luckless Henderson found himself in a terrible quandary. It was only too clear, as he had suspected, that there was "sum ewill to be done," and he would fain have been out of it. His plain duty, of course, was to defend the king; but then it was a serious matter to offend his master, who had it in his power to inflict death or worse, upon a contumacious servant, and clearly had, besides, the king at his mercy. On the whole, the poor fellow acted a part, not heroic, indeed, but which saved the king's life.

Meanwhile Gowrie had not been idle downstairs. In order to get Lennox, Mar and the rest of the king's suite out of the way, one of Gowrie's servants by arrangement ran into the hall crying that the king had ridden out to the Inch, on which Gowrie called out, "Lo horse! gentlemen," and the whole company went out, sent for their horses, and stood outside the outer gate waiting for them. While they stood there, they heard a cry, "Fy! Treason, treason!"

"That is the king's voice," exclaimed Lennox, "be he where he may."

Looking up to the turret, they saw the king's face at the open window with a hand gripping his mouth.

"I am murdered," came the voice again. "Treason! My lord Mar, help, help!"

Rushing into the house and up the main staircase, they were stopped by the locked doors, and then found that Gowrie was no longer with them.

During Alexander Ruthven's absence the king had been parleying with Henderson, asking him for what purpose he had been posted in the turret. "As God leves," he replied, "I am schott [shut] in heir lyke as ane dog." Then the king bade him open the window, which he had no sooner done than Alexander Ruthven re-entered the turret, this time leaving the door unlocked behind him. He declared there was no hope; that the king must die, and attempted to bind his

arms with a garter. But James made a dash for the open window, and uttered those cries for help which had startled his gentlemen below. Ruthven attempted to shut his mouth, whereupon the king showed he had some mettle in him, closed with his assailant, got his head under his arm, and forced him backwards out of the turret. All this time the wretched Henderson stood shaking with fear, helping neither of the combatants.

As good luck would have it, young John Ramsay, one of the king's suite, finding the door at the foot of the secret stair open, dashed up, burst into the room, and attacked Ruthven with his dagger. Henderson took this opportunity of bolting. "Fy!" cried the king to Ramsay, still gripping Ruthven tight, "strike him laigh! because he has ane pyne dowlit [a mail-shirt under his doublet] on him." Ramsay struck home; then, seizing the dying Ruthven by the shoulders, flung him down the staircase. Three men of the king's suite now came up, and hard at their heels came Gowrie with seven men, all with drawn swords. Ramsay thrust the king back into the turret, and the four loyal men faced the traitors. Ramsay, who must have been a smart swordsman, "yokit" with Gowrie and thrust him through the heart, while the rest of the crew were "dung [forced] over the staires with many hurtes."

So ended what was probably the most stirring quarter of an hour in James's life, in which he carried himself remarkably well. There was enough, indeed, to shake the firmest nerves—the many locked doors, the lonely chamber, the armed man, the insolent Ruthven. But the conspirators blundered badly, and James was cool enough to take the advantage offered him. The loyal bailies of Perth made him a great banquet, whereat, as Fleming mentions in his chronicle, "thair wes oucht punscheonis of wyne sett, and all druckin out." And just as one of this king's besetting foibles—cupidity, to wit—had been the means of leading him into the mess, so in this closing scene may be detected a char-

acteristic trace of a more venial one—namely, his pedantry; for in subscribing his name—*Jacobus Rex*—in the Guild-book after receiving the freedom of the burgh, he added the line, “*Parcere subiectis et debellare superbos.*”

Gallant young John Ramsay, brother of the first Lord Dalhousie, and descended from that unhappy knight whom Sir William Douglas starved to death in Hermitage Castle in 1342, was suitably rewarded, first with knighthood, and afterwards with an earldom.

Gowrie's ultimate object, in this plot must ever remain a mystery. He was a cultivated, able man, and it seems incredible that revenge for his father's execution should have been his sole object in devising a murder which, unless he had been strong enough to seize the kingdom, must inevitably have led to the scaffold. No other motive is apparent in the letters of his accomplice, Logan of Restalrig, which were brought to light eight years afterwards, on the confession, under extreme torture, of a wretched notary called Sprot; but there is much reason to support the suspicion that capture and not murder was the end in view, and that Gowrie would have felt avenged had he succeeded in delivering James into the hands of the Queen of England.

With Gowrie fell the hopes of the Presbyterian party, who looked on him as their leader in resisting Episcopacy. There was a lot of trouble with the Edinburgh divines after his death, by reason of their refusing to observe the thanksgiving prescribed for use in the churches, for his Majesty's preservation. They refused to give credence to the allegation of treason and murderous intent against a nobleman in whom they had so much confidence.

Perhaps what is most startling to the modern student of the records of this reign is the perpetual and pernicious interference with justice by the “British Solomon,” whether to promote or retard punishment—especially in witchcraft cases. And besides

the unhappy witches, the Highland caterans and the gypsies had good cause to deplore the altered times. The gypsies, especially, had been greatly encouraged by kindly, credulous James IV., whose accounts teem with gifts made during his many journeys to the “King of Rowmais” and other “Egyptianis.” But the Reformation left men too serious to put up with “the vagabundis, soirneris cowmone thevis—repute, callit and haldin Egyptianis;” and a proclamation was issued calling on them to depart from the realm on pain of death. Ill was it for those who disregarded it. Throughout James VI.'s reign batches of these unfortunate creatures were hounded to the gibbets, alternately with herds of Macgregors, till, on 24th January, 1624, “Capitane” John Faa and seven of his merry men were hanged together on the borough moor, and their widows and daughters, to the number of eleven, were sentenced to be drowned. But this was too much even for the stomach of King James, who, of his clemency, commuted the doom on the women to banishment, due care being taken to grab all the “movabill” property belonging to the tribe.

Allusion has been made in this brief summary of the Gowrie affair to James VI.'s unlovely fondness for pelf. Well, we all have our failings, and it is not good to dwell too much on those of other people; but, unhappily, one is bound to take this royal failing into account, as it affected the administration of justice. There is too clear proof, not only of the habitual consideration extended to the grossest criminals who could afford to buy indemnity (“for sindrie reasonabill caussis and consideratiounis moving ws” is the usual expression in royal letters of remission), but of actual “put-up” charges, in order to extort money for the king's use. No other explanation can be given of the proceedings taken in 1601 against John Kincaid, the wealthy young Laird of Craighouse, on the Braid Hills. Abduction of heiresses was no uncommon offense in those

riding days, and Kincaid was charged with having carried off a "wedo" from Bailie Johnstoun's house in Water of Leith, in broad daylight, and taken her to his castle of Craighouse. By the strangest coincidence, King James, "the sapient and the sext," happened to be taking the air on horseback near Craighouse at the very moment when the eloping couple (for there is no evidence of reluctance on the lady's part) arrived at the front door. With the unerring discernment of a Solomon, the king instantly perceived that this was a "rapt;" with the noble impulse of a true knight he sent his suite to the rescue; the lady was set free and the gallant lodged in prison that night. There he lay, from 18th December to 17th February, till, induced by *squalor carceris* to accept any terms, he "cam in the kingis will." The said "will" was that he should be set free on payment of 2,500 marks (an immense sum for a private gentleman of those days); as also, that he "sall delyner to ws his broune horse."

In considering the almost incredible severity with which the king permitted disrespect to his name or person to be punished, it is necessary to remember not only the prevalent doctrine of divine right, but James's exaggerated estimate of the kingly office. Still, it is disgusting to reflect that the king, who was so ready to remit punishment when something could be got for it, withheld the royal mercy in the case of John Dickson, an English mariner, who, in 1596, having been required by one of the king's cannoneers to veer his boat out of the line of a gun, declared that he would veer his boat for neither king nor kaiser, and that the Scots king was "ane bastard, and nocht worthie to be obeyit." For these uncomplimentary expressions to a foreign sovereign Dickson was tried and hanged. Imagine one of Scotland's greater monarchs — Alexander III. or Robert the Bruce — permitting such disgraceful cruelty!

A still worse case occurred in 1600.

Frances Tennent being convicted of having, three years before, written "certane vyild and seditious Pascallis [pasquils], detracting ws and our maist nobill progenitouris," the king issued his warrant ordering the offender, first to be tortured in the boots, then to be taken to the market cross of Edinburgh and his tongue cut out, and lastly to be hanged. A second warrant followed, however, in which the king says that,

"for certane causes moving ws, We haif thocht gude to mitigat that sentence, be dispensing with ye torturing of ye said frances, other [either] in the buittis, or be cutting out of his toung; aud ar content that ye onlie pronounce dome aganis him to be hangit."

The victim was a well to do merchant burghess of Edinburgh, and of course part of the sentence directed that all his goods should be forfeited, "and inbrocht to our souerane lordis vse."

Let the saddle be put on the right horse. In ordinary cases, the judge passed sentence, subject to revisal by the king; but in offenses against the king's person or dignity, the prisoner was remitted to ward till the king had decided on the manner of punishment. This was the procedure even in the case of Thomas Ross (1618), a poor crazed student of Oxford, who, distracted with poverty, and having appealed for help in vain to several Scottish gentlemen in London, penned a thesis, calling on the English people to expel the Scottish courtiers who swarmed round the king. He compared them, perhaps not inaptly, to the

"seaven leane ky of Pharo that conswmet and distroyit the sevin fatt and weill fed ky, and yit war nocht satisfet. . . . Vnto his schyning and royall Maiestie be vntrublet health and increse of glory! Bot God frome the heavnes, persew these Courtiours with blak fyre and brimstone!"

This precious document he affixed to the door of St. Mary's Church in Oxford. It was brought before the Vice Chancellor; the luck-

less scholar was haled off to Edinburgh, tried, convicted — and what was the decree pronounced by “his schyning and royall Maiestie”? Why, that he should be taken to the market cross,

“and thair vpone ane scaffold, first his rycht hand to be strukin aff, and thaireftir his heid to be strukin frome his bodie: And his heid to be thaireftir affixt and set vpone ane irne prik [iron spike] vpone the Nether Boll Poirt; and his said rycht hand to be also affixt vpone the Wast Poirt of the said burgh of Edinburgh: And his haill moveable guidis and geir (gif he ony hes) to be escheit to his Maiesteis vse.”

How frightfully disproportionate to the offense was the punishment inflicted upon offenders against the king's dignity, may be seen in many instances during this reign. In 1615, John Fleming, in Cockburnspath, for not coming to communion, was pulled up by his minister, who reminder him that even if he disregarded the discipline of the kirk, the king would punish any one guilty of contempt of ordinances. On which John observed very improperly that the king might be shot, or die of the falling sickness, for all he cared;

“be the vttering of quhilkis damnable and blasphemous speiches aganis his Maiestie, he had committit most harynous and vnpardoneable tressone.”

Will it be believed that for his hasty words this unfortunate man was hanged?

Almost as monstrous was the sentence on William Tweedie, who was charged, first with theft and slaughter, and next with irreverent speech about the king and justices of the “Peax” when the constables came to arrest him. He had declared, it seems, that “he wald nocht give ane — of his — for the justices of the Peax,” nor yet for the king. Well, the jury unanimously acquitted Tweedie on the charges of theft and slaughter, alleged to have been committed at various periods from *eleven* to *twenty-nine* years previously,

but convicted him of the “vnreverent and disdanefull speiches;” whereupon he was sentenced to be scourged through the streets of Edinburgh, and then to be banished for life, on pain of hanging if he returned.

James VI, had been nearly forty years on the throne before much had been effected towards reducing the Highlands to order. It is true that, as long before as 1563, the legislature had formally adopted the sanguinary expedient of setting the clans to hunt each other down. In that year the atrocities of the Clan Gregor had become so frequent and outrageous that it was proscribed and commissions were issued to chiefs of other clans to extirpate them with fire and sword. Every one who has read the introduction to “Rob Roy” must be familiar with what followed, how bloodshed and burning went on worse than before; the offenders, failing to appear when summoned for prosecution, were sentenced to outlawry, but, being beyond reach of apprehension, snapped their fingers at the terrors of the justice. With the seventeenth century began a new era in the administration of the Highlands, and the measures of repression became hardly less horrible than the state of affairs they were framed to bring to an end. The Macgregor's cup of of iniquity was filled in 1603, by their slaughter of the Colquhouns in Glenfruin. The Chief of Macgregor had the authority of the king's lieutenant, the Earl of Argyle, for invading the Lennox, while Colquhoun had mustered his forces to resist the Macgregors under direct commission from the king. Sir Alexander Colquhoun¹ fled from the field at the first onset, leaving his men to be cut to pieces, of whom one hundred and forty are known to have been slain. All the blame for this being laid to the account of the Mac-

¹ Sir Walter Scott says that Sir Humphrey Colquhoun commanded the clan on this occasion and was chased to Bannachra Castle, where the Macgregors slew him. But Sir Humphrey had been murdered in that castle by the Macfarlanes eleven years previously, in 1592, and his brother Alexander, who succeeded him, was still alive seven years after the battle, in 1610.

gregors, Argyle united his forces with those of the government for their apprehension. The chief — Macgregor of Glenstrae — was taken by the Laird of Ardkinlas, but escaped, whereupon Argyle invited Glenstrae to come and treat with him, under solemn promise that, if they failed to agree, he should be allowed to go free. Glenstrae nothing doubting, came to the meeting, and yielding to Argyle's perfidious advice, agreed to accept an escort to be provided by the earl to conduct him out of the kingdom, Argyle undertaking to obtain the king's pardon for the slaughter of Glenfruin. It was a shameful trap. Argyle and Macgregor travelled together to Edinburgh, whence an escort was sent with the outlaw to Berwick, to place him on English ground. Thus the letter of part of Argyle's promise was kept. But the escort had instructions to rearrest him at once. He was brought back to Edinburgh, tried with four of his clansmen, and all five were hanged. With them were hanged, without trial, seven other Macgregors, "young men, and reputed honest for their own parts,"¹ who had given themselves as hostages. Twelve Macgregors had immediately preceded their chieftain on the gibbet, and wholesale hangings of the broken clansmen went on for years afterwards — nine of them on March 2, 1611, ten on July 28, 1612, six on June 22, 1613, and so on.

However hateful we must deem the perfidy which brought these poor hillmen to their doom, and however repugnant such wholesale hangings must be to modern ideas of judicial measures, it has to be confessed that it is difficult to see how the social ulcer of the highlands could have been dealt with by anything short of actual cautery. The tradition of clan vengeance was too deeply rooted — the practices of robbery and blackmail too essential to existence — to yield to anything less than force. A typical instance of what was common in almost every glen may be found as late as 1623 in the trial of

nine Buchanans for the slaughter of the son of the Chief of the Macfarlanes. The prisoners admitted the slaughter, but pleaded that it was justifiable because of what had happened not long before. William Buchanan, it was stated in the defense, having incurred the vengeance of the Macfarlanes by informing against certain of that clan and exerting himself to recover stolen goods and cattle from them, met with a horrible fate at their hands. Having gone hunting one morning in the Lennox alone, with four hounds, he was waylaid and seized by half a score of Macfarlanes, who bound him to a tree at eight o'clock in the morning, and every hour thereafter till six in the evening they inflicted three wounds with a dagger, "in such pairtis of his body as war nocht to bring present daithe." Then they cut his throat, tore out his tongue, and disembowelled him; killed the four dogs, put the tongue of one of them in their victim's mouth and its entrails in his body, and decamped, leaving the corpse stark naked. It is fair to the Macfarlanes to say that they met this allegation with a supplication to the Privy Council, in which they protested that, although they could not "extenuat the slauchter" of Buchanan, "who, to our regrait, was mischeantlie [*meschamment*] and vnworthilie slayne," yet the circumstances of his death had been exaggerated "past the boundis of modestie" by his kinsmen, "after suche a detestable manner as might mak we, who ar innocent, to seame odious." Probably there was not much to choose between the two parties to this savage feud: at all events, nobody seems to have been hanged on either side.

We are familiar, even in our own enlightened age, with the strife engendered by questions of land tenure. The hatred of the "land-grabber" was as intense in Scotland of the seventeenth century as it is in Ireland at the present day, and identical methods of terrorising him have been adopted in both countries. A typical case, on a large scale, was afforded by certain doings at Howpasley

¹ Calderwood's MS., quoted by Pitcairn.

near Hawick in 1616. Howpasley was the property of a lady named Scott, but by some means, either by wadset, apprising, or other legal diligence, it came into temporary possession of Sir James Douglas of Drumlanrig, who put a stock of sheep on it. But the Lady of Howpasley was full of the old border mettle: she summoned sundry of her clan, Jock Scott the Suckler and other Scotts—Wattie and Ingram and Marion's Geordie and Bonnie Johnnie—and arranged with them the lesson to be read to the land-grabber. It took the form of "sic monstrous and vnhard of crewaltie," so runs the ditty, "as the lyk guhair of hes nocht bene hard amangist the wyld Irisch¹ and savage people, let be within any reformat and ciuile pairt of his Maiesteis domininois." The Scotts above named, coming by stealth one night to Howpasley, fell upon the sheep, slew forty of them, "and the rest of thame, thair spaldis [shoulders] and legis wer sturkin away fra thame in maist barbarous maner, and war sa left spreuleing in thair deidthrawis [death struggle] upone the grund." Jock the Suckler having turned king's evidence, which brought three of his comrades to the gallows, was pardoned; but he was far too notorious to be allowed to go free. He was rearrested on a charge of sheep-stealing, and swung for it on June 21. What became of his faithful accomplice—his dog—called Hide-the-Bastard?

The frequency of capital punishment is one of the ugliest features in the social life of the metropolis at this time; and the number of malefactors hanged, beheaded, burnt, drowned, broken on the "row" and otherwise disposed of in public spectacle, bore a large proportion to the city population, which cannot have greatly exceeded 20,000. Milder measures might have failed to redeem the country from the anarchy which had long prevailed, but unhappily the reign of James VI. is distinguished by the initiation and fre-

¹ The allusion is to the Highlanders, who were still called Irish or Erse.

quency of a class of proceedings far more appalling in their shocking cruelty and folly, inasmuch as they were conducted before the highest tribunals in the land and occupied in a peculiar degree the personal attention of the monarch. No Scotsman can look back without shame and burning indignation upon the action of the State and the Reformed Church in the suppression of witches. No doubt the guilt was not all on one side. No doubt there were, in all parts of the country, creatures of both sexes,—partly imposters and partly dupes of still greater scoundrels—who claimed to exercise supernatural powers by the aid of evil spirits.—These were a class of miscreants, among whom would-be assassins could always find willing instruments—a class which it was right and necessary to suppress; but the means adopted to do so—the black superstition and abject terror shown by clergy and laity alike—brought down the judges to a lower level of disgrace than the culprits themselves.

The "dittays" drawn up by the Lord Advocate against the accused often betray almost incredible simplicity and credulity. Thus among the charges against Patrick Lowrie, executed for sorcery in 1603, appears the accusation that "the said wikkitt Spreit, the Devill, in the liknes of Helen McBrune, presentit to the said Patrik ane hair belt; in ane of the endis of the quhilk belt appeirit the similitude of foure fingeris and ane thombe, *nocht far different frome the clawis of the Devill*." Any juryman whom common sense or common honesty prompted to reject such rubbish as this, did so at his peril. Instances occur of jurymen who had acquitted persons accused of witchcraft being put on their trial for wilful error on assize—an offense punishable with forfeiture, banishment, and being proclaimed "infamous."

In 1591, Barbara Napier, having been tried for conspiring with "ane notoure and knowin nigromancer" to kill the king, and a number of other illegal acts, twelve out of

the fifteen jurymen, while finding her guilty of consulting with witches and "nigromancers," acquitted her of the more serious counts in the dittay. To have convicted her on all of them would have implied belief in her presence in the kirk of North Berwick, when

"y^e Dewill start vp in y^e pulpett, lyke ane mekill blak man, with ane blak baird stikand out lyk ane gettis baird [goat's beard]; and ane hie ribbit neise [hooked nose], falland down scharp lyke the beik of ane halk [hawk]; with ane lang rumpill [tail]; cled in ane blak tatie [shaggy] gounne, and ane ewill favorit scull bonnett on his heid, &c."

The trial took place on May 8; sentence was not pronounced, owing, probably, to the disagreement of the jury on the charges as a whole. On May 10 came a letter from the king complaining that "na dome is pronunceit aganis hir as yit," and directing that she shall instantly be sentenced to be "bund to ane staik besyde the fyre and wirreit [strangled] thairat quhill [until] scho be deid," and afterwards burnt in the orthodox manner. A month later, on June 7, the twelve merciful jurors were arraigned, "his Maiestie being sittand in judgement," for wilful and manifest error in their verdict, "incurrand thairby the horribill cryme of periurie." It is satisfactory to record that they were acquitted.

The guilt of witchcraft was not measured by the malignancy of the culprit's acts, which were sometimes extremely beneficent. Out of the fifty-three separate charges on which Agnes Sampson was tried and condemned to be burnt in the same year as Barbara Napier, nearly all were alleged cases of curing sickness or alleviating pain "be hir dewillisch prayerisch and incantatiounis." Another case of the same sort in the same year was that of Geillis Duncan, servant maid to Bailie Seaton of Tranent. It is remarkable as showing the extraordinary license allowed to private persons in amateur witch-hunting. Geillis rashly undertook to help "all such as

were troubled or grieved with anie kinde of sicknes or infirmitie," and succeeded so well that her master began to suspect her of illicit arts. "To the intent that hee might the better trie and finde out the truth of the same," he put her to the torture, first, of the "pilliwinkis," whereby the tips of her fingers were pinched and crushed, and then by the severer torment of twisting cord round her head till the temples nearly burst. By such means this unhappy girl not only was cured of all inclination to gratuitous deeds of mercy, but in her agony was induced to implicate a number of other persons in her supposed misdeeds.

Among these was Dr. John Fean, school-master of Tranent, whose case may be taken as typical of those in which James VI. took a personal and abominable part. In fact, in presiding at these fiendish proceedings and exercising his ingenuity in devising new forms of torment for the accused, the king discharged with far more realism the conventional part of Satan than any of his victims had succeeded in doing. Fean, having been put on his trial for twenty separate "poyntis of wichcraft," such as raising a storm for the destruction of the king on his voyage from Denmark, and other equally preposterous charges, was submitted to torture in order to extract a confession. First, his head was "thrown" (twisted) with a rope, and when that failed he was put in the "boots," and, after receiving three strokes, on being asked if he would confess "his damnable actes and wicked life, his toong would not serve him to speake." The common-sense explanation of this would have been that the wretched creature was speechless — from the faintness caused by excessive pain, but the experts declared that it was owing to a spell cast by Satan. This having been overcome, Fean declared himself ready to confess anything, whereupon he was taken out of the boots, brought before the king, to whom he made and subscribed a full confession.

As was usual, however, in such cases, no

sooner was the pain of torment abated than the spirit of the man revived ; and we learn what followed from a tract printed in London at the time :—

“Notwithstanding that his owne confession appeareth, remaining in recorde under his owne hande writting, and the same thereunto fixed in the presence of the King’s Majestie and sundrie of his Councell, yet did hee utterly denie the same. Whereupon the King’s Majestie, perceiving his stubborn willfulness, conceived and imagined that hee had entered into newe conference and league with the Devil his master for more tryall of him, to make him confesse, hee was commaunded to have a most straunge torment, which was done in the manner following. His nailes upon all his fingers were riven and pulled off with an instrument called in Scottish a Turkas, which in England wee call a payre of pincers, and under everie nayle there was thrust in two needels over even up to the heads. At all which tormentes notwithstanding, the Doctor never shronke anie whit; neither woulde he then confesse it the sooner, for all the tortures inflicted on him. Then was hee, by all convenient speede, by commaundement, convaied againe to the torment of the bootes, wherein hee continued a long time, and did abide so many blowes in them that his legges were crusht and beaten together as small as might bee; and the bones and flesh se brused, that the bloud and marrow spouted forth in great abundance; whereby they were made unserviceable forever.”

The brave doctor continued staunch in his refusal to confess, wherefore his poor mangled body was condemned to be strangled and burnt, which of course would have been his fate in any case.

Faugh! Dr. Fean was but one out of hundreds of victims to this beastly superstition, which, like all worst kinds of cruelty, took its rise out of blind terror, driving this most Christian king to commit precisely the same atrocities as are practiced by black African tyrants. Boxes were set up in the churches to receive anonymous accusations against all and sundry and these convenient vehicles of privy malice sufficed to set the law in motion against suspects.

It is a relief to turn to another part of this record and mark how, in spite of the awful abuse of the law, even-handed justice was gradually being brought into play in dealing with accused persons. One vital defect still continued in force, namely, that the most heinous crimes escaped punishment if nobody appeared as “pursuer.” There was no danger of such a lapse in cases of witchcraft; the clergy, or some agent of the king, were always ready “to pursue” in those cases where the neighbors of the accused were either too frightened or too sensible to appear. But in murder cases it was different. If the murdered was wealthy, or had sufficient interest at court, the nearest of kin could generally be “satisfied” by hard cash, and granted “letters of slanes,” which caused the case to be abandoned. Thus, in 1605, when the Earl of Crawford and three others set upon Sir David Lindsay of Balgaweis and slew him near Brechin, Margaret, daughter of the murdered knight, gave such “letters of slanes,” “beiring satisfioun and Assythemment to be maid be the said Erle for the foirsaid slauchter,” “passed simpliciter fra the persute,” and the earl went free.

But a notable departure from former practice was made in another murder trial, in 1624, when “Harie Liston, indueller in the bak of Plesance [Edinburgh], callit the Bak Raw,” was charged with the murder of a farmer on the Borough Moor. For the first time on record, the prisoner was allowed to produce witnesses in court to prove his innocence. Up to this time, strange as it may sound in modern ears, the examination of the prisoner and all witnesses was conducted by the Lord Advocate before the Privy Council, or a commissioner appointed by that body. The evidence so obtained, together with all declarations and confessions made *in camera*, were produced in court, and the assize had to return a verdict upon these alone, no subsequent evidence being admitted or cross-examination allowed. All honor, then, to Sir William Oliphant of Newton, then Lord

Advocate, who in this trial sanctioned this weighty innovation by allowing Liston to produce witnesses before the jury, to such good effect that he was unanimously acquitted.

Henceforward the jurors were constituted judges of the law as well as of the fact, a charge to which may be traced about this time a growing tendency in counsel to indulge in hair-splitting arguments about the exact meaning of legal terms. Thus in 1618, one of the many individuals, honest and otherwise, who have borne the name of Walter Scott, was tried for the "mutilation" of John Dalgleish by striking of three fingers of his left hand. The act was not denied; the two men had fought; Scott got a bloody scone, and Dalgleish had the misfortune to lose three fingers. But Mr. Thomas Nicolson, "Advocat," counsel for the defense, argued at great length that the charge should be quashed because here was no mutilation.

"*Mutilatio*," he maintained, "*est tantum amputatio membri*, and a finger is not legally a 'member.' Thair is na member suttit af, ffor the persewaris haill hand, and fingers thair of, are yit extant be occulour inspectioun, . . . and he is able to grip thairwith. . . . The finger is nocht *membrum*, bot *pars membri*, as sayis Baldus;

and so on with interminable length and ingenuity, which would have afforded infinite pleasure to King Jamie, had he not been absent in London at the time. The jury took a very commonplace view, that the destruction of three fingers amounted to mutilation, and convicted Scott; but the matter was finally settled by arbitration of "my Lord of Balcleuche" (Buccleuch).

Let every man have his due: though the justiciary records of this reign contain enough to sicken any reader (the cases quoted above are not one whit more horrible than many others), and make it difficult to realise that less than three centuries intervene between the Jubilee of James VI. in 1617 and the Diamond Jubilee of Queen Victoria in 1897, still allowance must be made for the influence on a pious monarch of the spiritual teaching of the time. If the king degraded his office by pandering to a dark superstition, much more must the ministers of religion be held blamable for inciting him to sinister activity. The persecution of witches in Scotland was scarcely heard of till after the Reformation; and it was carried on with relentless zeal all through the Covenanting times. James had been five-and-twenty years in his grave when, on April 2, 1659, ten women were tried together at Dumfries on a charge of witchcraft. Nine were convicted, and the presbytery appointed eight ministers "that they be assisting to the brethren of Dumfries and Galloway the day of the execution." All nine were publicly burnt at Dumfries together.¹ What terms could be found to express our horror for the organisers of such a holocaust had it taken place in darkest Africa? Yet these ministers thought they were doing God service: they had scripture at their finger-ends, and had not St. Paul enumerated witchcraft among the works of the flesh?

HERBERT MAXWELL.
IN BLACKWOOD'S MAGAZINE.

¹ Macdowall's History of Dumfries.



LEAVES FROM AN ENGLISH SOLICITOR'S NOTE BOOK.

VIII.

"SAVED BY A PANCAKE" OR "OLD HARBOTTLE'S WILL"

BY BAXTER BORRET.

(Registered at Ottawa in accordance with the Canadian Copyright Act.)

THE eccentricities of testators are unfathomable; the craft and subtlety of a wily widow are immeasurable. The story which I am now going to relate exemplifies both these propositions. Samuel Harbottle had lived a bachelor all his life; at the age of seventy-five he fell into the snares of a wily widow. He had not a relative in the wide world, and very few friends, only two who play any part in this history; one a cast-off lawyer's clerk named Brooks, who picked up a precarious existence by drawing wills and other legal documents on the sly; the other friend was a foreigner named Albert, whose wife was an intimate friend of the wily widow, and of her then recently defunct husband. Old Harbottle had in an unguarded moment spoken to the widow of his wish to find a housekeeper to look after his domestic wants; a few innocent questions skilfully put had elicited from him an admission that he had plenty of money and no relatives; thereupon she set to work to angle, and very soon hooked her fish, but the landing of her prize was a matter of greater difficulty. After the time and place had been fixed for the wedding, which was to take place strictly on the quiet in Birmingham, two days before the appointed time old Harbottle had a fall and injured his leg, and sent his friend Brooks to interview the widow, to ask her to have the nuptials postponed. The answer given was of so very guarded a kind that Brooks scented mischief in the air, and advised the old man to look out or he would have an action for breach of promise of marriage brought against him; and then came in the craft of the cast-off lawyer's clerk; he advised him, at any personal inconvenience,

to present himself at the appointed church on the day and at the time fixed for the wedding, and to make, so to say, a legal tender of himself before action, according to contract, in the presence of a witness, and there would be a bar to any action forever afterwards. This advice old Harbottle proceeded to carry out; starting on the appointed day, with Brooks for a witness, he took train to Birmingham, and arrived at the church at the time fixed. But the secret had leaked out somehow, and the wily widow followed him by the next train, met the limping bridegroom just as he was leaving the church; with a sweet smile she apologized for having kept him waiting, summoned the parson from his rectory close by, and landed her fish. Brooks was left to slink home in disgusted solitude; the bride embraced her limping spouse, and said her own house was waiting, swept and garnished for their reception, and there we had better leave them to enjoy their honeymoon. Two days afterwards she took him to his lawyer's office, where he executed a will, leaving to her, absolutely, everything he possessed. In the course of this story I shall have to speak of several wills, and will call this one "will No. 1." On the same day he presented his bride with a very magnificent necklace of diamonds, which, I may mention, he had casually shown to her before asking her to marry him. Alas for the craftiness of woman! She showed them to her friend Mrs. Albert, whose husband showed them to a friendly pawnbroker, who unkindly declared them to be the most perfect imitation of real diamonds he had ever seen. Then followed tears, heartburnings and upbraiding; also a

second will, by which the testator left "to his beloved wife Elizabeth the sum of one shilling, to her friend Albert the sum of thirteen pence and one half penny," and all the rest to religious charities, and appointed Brooks sole executor. My readers will think I am romancing; I can only say that this extraordinary document is filed and recorded in the Probate Registry at Somerset House, London. I need hardly remind American readers that by the law of England a testator has the power of leaving everything he possesses to any objects he chooses; and, where there is a will a widow has no right to dower, or thirds, or to anything else. Old Harbottle having signed the will, paid his lawyer, and pocketed the lawyer's receipt for his fee, went home to his wife, told her he had spent a delightful morning, sat down to dinner, dined not wisely but too well, retired to the kitchen, and fell asleep in his chair before the fire.

I should mention that one of the inmates of the abode of nuptial happiness was a small servant girl named Annie Gurr, a sharp, precocious child, of whom much will be told hereafter. On the evening of the day of the execution of "will No. 2," Annie Gurr presented herself before her mistress, who sat like Penelope, disconsolate, engaged in some work of domestic embroidery (darning her husband's socks, I think), and said: "Oh, mum, here's master been and fallen asleep before the fire, and his pocketbook has fallen out of his pocket onto the floor." "Are you quite sure he is asleep, Annie?" "Oh, yes, mum; you can hear him snoring." "You had better go and bring me the pocketbook, Annie, it ought not to lie there." Mrs. Harbottle knew her duties as a wife; she examined the contents of the pocketbook, read the lawyer's receipt for the preparation of the new will, kept the receipt for use at the right moment, went down to the kitchen, roused her sleeping lord, pointed out to him that he had dropped his pocketbook on the floor, which he hastily replaced in his pocket; she then supported his tottering steps to his

bedroom, and there we had better leave them. In his undying epic Milton has described in language of great beauty the nuptial couch of our first parents in Paradise; I am not Milton, and I dare not liken Mr. and Mrs. Harbottle to Adam and Eve; I can say that, like a faithful wife, she did more for her graceless spouse than ever did Eve for Adam, for she undressed him and tucked him up in his bed. The next morning, at breakfast, delicate inquiries were made by the tender wife as to the state of her lord's health, followed up by equally delicate questions as to why he had been making a new will, eliciting a virtuously indignant denial that he had made any new will, reiterated with sundry strange oaths, which increased in vehemence when the tell-tale receipt was produced; then, dead silence.

But "hope springs eternal in the human breast," and the craft of wily woman is immeasurable; calm followed storm, and the wily wife proceeded to try her hand at producing sunshine. Old Harbottle's birthday drew nigh, cold wintry weather set in; with her own deft fingers Mrs. H. knitted a warm woolen wrapper for her lord's graceless throat; the birthday gift pleased him so much that, at his own suggestion, hand in hand they betook themselves again to his lawyer's office where another will was drawn up and executed, like unto "will No. 1," leaving her everything absolutely, which will she took into her own custody; and so the birthday ended happily. Alas for the eccentricity of testators! Before another month had passed, and while the tender wife was lying ill upstairs, prostrated with pneumonia, her faithless husband executed yet another will, drawn up by Brooks on the sly, leaving his wife out altogether, bequeathing to his esteemed friend Brooks a legacy of £200, appointing him sole executor, and leaving all the rest of his property to religious charities. This was "will No. 4." And now bitter winter set in, the wife recovered from her illness, but her husband took to his bed, and lay for

many days in considerable danger, during which time his wife, obedient to the true instincts of womanhood, nursed him tenderly and devotedly while he lay only half-conscious most of the time. One morning (I can fix the exact date, it was Saturday, the 15th of February), he woke from his state of semi-consciousness, and taking his wife by the hand said, "Lizzie you have been a good wife to me, and I have done you a great wrong, but I will put it right before I die; send a message to your friend Albert to come and see me tomorrow, and find for me that will which Mr. Burke made for me on my birthday." Albert called on the Sunday, was told to make a fresh copy of the will to be signed on the following Tuesday and to bring with him some trusted friend on the evening of that day as a second witness. Albert carried out these instructions to the letter; he and a friend, Mrs. Harbottle's brother, came together to the house; the old man was propped up in his bed, and signed the "will No. 5," leaving everything to his wife, the same as in "will No. 3;" two days afterwards he passed away in sleep.

These were the facts of the case precedent to the old man's death, as given to me in detail by the widow when, shortly after the death, she instructed me to act for her. On the morning of the death the widow sent for a friendly undertaker, produced "will No. 5" to him, and gave him instructions for the funeral; two hours later Brooks called on the same undertaker, produced "will No. 4," and was about to give him instructions for the funeral also, but was told he was out of it, as there was a later will. So war was declared, and litigation commenced. The widow applied for probate of "will No. 5;" Brooks applied for probate of "will No. 4," alleging that "No. 5" was a forgery; or, in the alternative, that it was executed by the testator under undue influence, and when he was not competent to execute a will. And whilst I was preparing for trial I made inquiries for the small servant girl, Annie Gurr,

and was told she had been dismissed by her mistress for impudence, and that her last words on leaving had been that "she would make it hot for the missus when the will case came on;" and further private inquiries elicited the fact that she had gone over to the enemy, and was coming forward to swear that she had been in the house the whole of the 18th of February, without once going out; and that neither Mr. Albert nor the second witness had been to the house on that day. This was a "stumper" indeed. I sent for the widow in hot haste, and pointed out to her that, if the girl's evidence was believed, the case would not stop there, but would evolve itself into a criminal prosecution of the widow and the attesting witnesses for conspiracy and forgery. She stuck to her guns manfully, and said she feared nothing; and then I asked her how the girl could swear so positively to the date, and turning carelessly over the leaves of my diary I said, "Tuesday, 18th Feby., Shrove Tuesday," and I muttered the word "Pancakes." Up jumped the widow, "Did you say Pancakes. Was it Pancake Day? Then we have got her sure enough." (I may here mention for the benefit of the uninitiated reader that there is a custom in England, as firmly established as is the custom in the States of eating turkey on Thanksgiving Day, of eating pancakes on Shrove Tuesday the day before the commencement of Lent.) And then the widow proceeded to tell me an interesting little story.

I proceeded to prepare for the trial. I retained for my leading counsel an able and experienced Q. C. whom I shall call Mr. Gripper, who advised that the case was a funny one, and that I must be prepared for anything. The first two witnesses called were the attesting witnesses of the "will No. 5," who gave their evidence well and were not shaken by cross-examination. Then Mr. Gripper called the widow, and here my anxiety commenced in earnest. Those of my readers who have had experience will agree

with me that women invariably make either very good or very bad witnesses, and you never can be certain beforehand which it will be. The widow was too frivolous, not to say frisky, and all my admonitions to her failed to make her grasp the seriousness of the situation. She had bought herself a charming bonnet of pearl gray, in which to appear in the witness box, and it was only owing to the blandishments of the oily tongued undertaker that she was at last induced to appear in the more fitting head-covering of widow's weeds, and persuaded to keep the pearl gray for her first appearance at chapel on the next Sunday after she had succeeded in gaining her case, if she ever did so. She gave her evidence in chief admirably, being adroitly led by Mr. Gripper; it was when Mr. Smoothly, our opponent, rose to cross-examine that the tension of my anxiety commenced in real earnest. He commenced gently, very gently, and very insinuatingly and she was thrown off her guard, and gradually confided to him the whole story of her courtship, the humorous circumstances attending the marriage ceremony itself, and then the varied incidents of their married life; he gently urging her on, as you may see an old cat playing with a mouse, now lightly tapping the luckless captive with a velvet paw to make it run a little, but keeping the cruel claw concealed just so long as there is sport to be got out of it; and so the game went on till you might have imagined you were hearing a gay and frivolous girl telling a story of racy fun to an old bachelor uncle for his amusement; my heart sank within me as he got her to join him in ridiculing the bare idea of her having felt any love for the miserly old man who had cheated her with a gift of false diamonds, and when he cleverly got her to admit that it was an immense relief to her mind when at last he passed away in sleep, two days after the signing of the will. It was admirably done on Mr. Smoothly's part, but Mr. Gripper in re-examination brought out the details of her careful nursing of the old man during his last

illness, details which were corroborated by the next witness, the medical man; and so our case was set on safer ground at the close of our evidence.

Then Mr. Smoothly rose to open the case against us, which he did in an impassioned burst of forensic oratory, pouring out torrents of fiery indignation on the head of the heartless harpy who had married the friendless old man for his money, and for nothing else, and had persecuted him day and night till she had induced him, as she thought, to leave her all his money, frustrating his pious intention of benefiting the religious institutions to which he had been so devotedly attached in life. I wish I could reproduce the speech; it wound up by an assertion of his confident assurance that he would be able to satisfy the intelligent body of gentlemen, facing him in the jury box, beyond all possibility of doubt that the will relied on was neither more nor less than a wicked forgery; that he would call before them a witness who, though of comparatively tender years, would give them the clearest evidence that on that momentous day, the 18th of February, neither of the witnesses who had sworn with such categorical pertinacity to the signing and witnessing of the will on that day, had ever entered the house; (Here Mr. Gripper whispered to me "The Lord hath delivered them unto our hands. Get the pancake witnesses up, but keep them out of sight,") and that he felt confident that the perjured harpy would by their verdict be sent back to her home in Georgetown, disappointed, to end her days in ignominy, a very scorn and derision to all them that are round about her.

"Very fine," said Mr. Gripper to me as we left the court together at the end of the day, "and if he had only left the forgery alone, and relied on undue influence and incapacity, he would very likely have had the jury with him; but if he relies on the girl to upset our evidence of due execution, and the pancake witnesses swear up to the mark, it will recoil on their heads and, perhaps, turn

the scale in our favor. Thank Heaven there are some fools left in the world yet! Keep cool, we may come out all right after all. Lord! what a fool that woman made of herself in the box."

The first witness called by Mr. Smoothly next morning was Brooks, who testified to the instructions given to him for the preparation of "will No. 4." (the due execution of which had been admitted) and he spoke of the old man having made to him many complaints of his wife's want of affection, and of his conviction that she did not care for him, and had only married him to get his money, and of his determination that she should not have it. Brooks was literally turned inside out on cross-examination by Mr. Gripper, who elicited from him that, in all his years of intimate acquaintance with him, the old man had never once entered a place of worship except on his wedding day ("so much for his piety and zeal for religious charities!" said Mr. Gripper), and that, notwithstanding his bequests in former wills to charities of legacies amounting to £30,000, he did not leave behind him more than £5,000 all told. In fact Brooks left the witness box in chastened humility.

And now came the crowning event of the trial. Into the witness box tripped lightly the diminutive Annie Gurr, as perky as a young dragonfly, with an air of precocious sagacity, and tossing a sarcastic scowl in the direction of where her former mistress sat. She of course swore by the card, that she had never left the house for a minute on the 18th of February, and that neither of the two attesting witnesses had been to the house on that day or night.

"My lord, I rise most unwillingly at this point," said Mr. Gripper, "to ask your lordship to give me leave to call the three witnesses whose names I have written down on the paper which I now hand to your lordship, to contradict that evidence flatly."

"I never like to shut out evidence, Mr. Gripper," said the judge. "Let us hear the evidence through first, and renew your ap-

plication when it is closed. Do you cross-examine the witness, Mr. Gripper?"

"Most certainly I do, my lord. Now, Annie Gurr," said Mr. Gripper, softly, "I implore you to be very careful how you answer this question," here his voice sank to an eloquent whisper, "Are you fond of pancakes, Annie Gurr?"

"Yes, sir, when I can get them."

"Do you ever remember having pancakes whilst you were in Mrs. Harbottle's service, Annie Gurr?"

"Yes, sir, but only once."

"Now, Annie Gurr, I want to ask you, do you know Mr. Thomas Atkins, a soldier, a nephew, I think, of Mrs. Harbottle?"

"Oh yes, sir; I know him quite well; he came to stay with missus while I was there."

"Now, Annie Gurr, do be very careful how you answer this question; does Mr. Thomas Atkins like pancakes?"

"Oh yes, sir; that he do."

"Really, Mr. Gripper," said the judge, sternly, "I am always most unwilling to interfere with any counsel during his cross-examination of a witness, but there are limits to the patience even of a judge."

"My lord, I most humbly crave your lordship's indulgence for one moment longer. I pledge myself not to ask this witness one irrelevant question," said Mr. Gripper.

"Now, Annie Gurr, you were telling us that you had pancakes once while you were at Mrs. Harbottle's house; can you tell us when that was? Do be careful, Annie Gurr."

"Well, you see, sir, it were on Pancake day, and Mr. Atkins he were staying with Missus, and Missus says to him, 'Tom,' says she, 'do you know what day this is?' 'No,' says he. 'Why, its Pancake day,' says she. 'Let us have some, auntie,' says he. 'Annie, go out and buy a shilling's worth of eggs,' says she."

"Well, Annie Gurr, go on," said Mr. Gripper. "You went out, bought the eggs, and you and your mistress made some pancakes; is that so?"

"Yes, sir; and we sat in the kitchen, me and her, and Mr. Atkins, and we ate six of them; I ate three of them myself, sir."

"Merciful powers!" said Mr. Gripper. "Well, and what happened then, Annie Gurr, though I hardly like to ask the question?"

"Well, sir, missus says to me, 'Annie,' says she, 'you know where Mrs. Peachey lives; just take the rest of the pancakes to her house; she and her husband may like them; wait while they fry them and eat them, and bring the dish back,' says she, and so I went there."

"How far off is Mr. Peachey's house, Annie Gurr? How long did it take you to get there? Remember, you had just eaten three pancakes."

"Well, sir, it took me over five minutes to walk there, sir."

"And how long did it take them to get ready the frying-pan, fry the pancakes, and eat them, Annie Gurr?"

"Well, sir, it was a pretty good time, sir. I sat there whilst they was eating them, and I ate one more."

"Good Heavens!" ejaculated Mr. Gripper. "How long were you away altogether, Annie Gurr, going, staying and returning; be very careful; remember, you had now eaten four pancakes; may I say an hour?"

"Yes, sir; it would be well nigh that, sir."

"At what time of the day was this, Annie Gurr? Morning, afternoon or evening?"

"It were about eight in the evening, sir, when I went out."

"And that was the only time you ever had pancakes all the time you were at Mrs. Harbottle's, was it, Annie Gurr, you are quite sure of that; do be careful?"

"Yes, sir, I am quite sure, sir; only once, sir."

"And what day was this, Annie Gurr; your memory is wonderful?"

"It were Pancake day, sir, for I heard missus say so, and so did Mrs. Peachey."

"Saved by a pancake!" ejaculated Mr. Gripper, sotto voce.

"Have you any question to ask the witness before she leaves the box, Mr. Smoothly?" asked the judge.

"No, my lord; I confess I have been greatly astonished, as well as greatly amused, at my learned friend's cross-examination, but I cannot see what pancakes, or Pancake day, have to do with the execution of 'will No. 5' by the testator."

"Consult an almanac for this year, Mr. Smoothly, and you will be enlightened," said the judge. "I shall direct the jury, as a matter of common knowledge, that the day which is ecclesiastically known as 'Shrove Tuesday' is vulgarly known as 'Pancake day;' that, as a fact, Shrove Tuesday this year fell on Tuesday, the 18th of February, the date of the execution of will No. 5; therefore, your last witness in swearing, as she has done, that she never was out of doors the whole of the evening of the 18th of February, but that she was out for at least an hour on the evening of Pancake day, contradicts herself, and that her evidence to the effect that the two attesting witnesses never came to the house on that evening is worthless. Mr. Gripper, you may spare yourself the trouble of calling Mr. and Mrs. Peachey, and Mr. Thomas Atkins."

My story draws rapidly to its end. Mr. Smoothly summed up his case with a fiery outburst of vituperation on the widow's devoted head, from which her comely bonnet of black was ineffectual to shield it; and the peroration was particularly fine. Mr. Gripper, in his reply, wisely avoided the dangerous pitfalls of fervid oratory, strongly urged the probability of the truth of the story told by the widow and the two attesting witnesses as to the due execution of "will No. 5," to the same purport and effect as wills Nos. 1 and 3, and that, without for a moment impeaching the testator's character for piety, it was only reasonable, in fact only the natural outcome of the workings of a pious mind, that old Harbottle should at the last have recognized it as a duty to provide for his widow, who had

nursed him so carefully in his last illness, and not disinherit her in order to benefit charities in which, during his lifetime, he had never taken any active interest. A calm, temperate piece of unaffected but convincing advocacy.

The judge's summing up was certainly cruelly sarcastic, and did not spare the widow

or favor our case. The jury, without leaving the box, found that the allegation of forgery failed, but, to my surprise, took two long hours before they found that the allegations of undue influence and incapacity had also failed. *

And so ended this most remarkable case, a case literally "saved by a pancake."



ARABINIANA.

SERJEANT ARABIN, who was at one time Judge of the Sheriff's Court and also Commissioner of the Central Criminal Court in London, was certainly a most remarkable administer of justice. He was thin, old, wizen-faced and very eccentric in his ideas and expressions, and even more so in his logic. A collection of his sayings was made by one of the members of the Bar, under the title of *Arabiniana*. Only a few copies were printed for private circulation, one of which has recently come into the writer's possession, and he offers a few extracts for the entertainment of the readers of the Green Bag.

In sentencing a prisoner who had been convicted of stealing property from his employer, Arabin thus addressed him: "Prisoner at the Bar, if ever there was a clearer case than this of a man robbing his master, this case is that case."

A small boy was called up for sentence:

ARABIN: "Prisoner at the bar, when I saw you first I knew you as well as possible; when you began to cry I knew you still better."

ARABIN (to witness): "Now mind. We sit here day after day, year after year, hour after hour, and can see through a case in a moment."

Indictment for stealing a fowl:

ARABIN: "I know of my own knowledge that there is not a little hen-roost near town that is not robbed continually."

A policeman was about to state a conversation between himself and his comrade, while in pursuit of the prisoner. Counsel objected that the prisoners were out of hearing.

ARABIN: "It does not signify a button.

Counsel repeatedly make this mistake. What he said to his comrade was not hearsay; it was about the robbery and part of the *res gestæ*."

On another occasion, when the subject of hearsay evidence came up, Arabin thus delivered himself to a witness:

"You must remember, and if you don't remember, you ought to know, that nothing whatever that is said in a prisoner's absence against him can be used in evidence under any circumstances whatever, if he was not present when it was said; and if he was, any man might be convicted and hanged in five minutes."

COUNSEL FOR PRISONER (to witness): "Did the prosecutor state that the prisoner had been in the room where the spectacles were?"

ARABIN: "That's matter of law, and for the jury."

"Can you believe that the prisoner's story is grounded without foundation, and fabricated in falsehood?"

"I cannot suggest a doubt. She goes into a shop, and looks at several things, and purchases nothing; that always indicates some guilt."

"Now what honest man could have any object in turning a horse's head round the corner of a street? I have no opinion on the subject. The case is with you and I shall only say that the law will not allow that to be done fraudulently which it does not sanction with violence."

"Law is founded on common sense, and those who take it for their guide in matters of fact and plain sense, will generally come

to an ultimate conclusion; and all property depends upon particular circumstances. If this had not been marked, there would not have been a mark upon it.

* * * *

A witness swore that the prosecutrix had said that the prisoner had stopped her and robbed her. COUNSEL FOR PRISONER. "Did she not say that the prisoner had *interrupted* her?"

ARABIN: "That makes no difference, interrupting and robbery are the same thing."

* * * *

Indictment charging offence to have been committed at half past six o'clock on the Sunday before Easter. Defense, *alibi*: Several witnesses swore that this prisoner was in another place at that time.

ARABIN: "A good deal has been said about the time, but we all know that in law sometimes the day is immaterial."

* * * *

"Prisoner, I have no doubt of your guilt; you go into a public house and break bulk, and drink beer; and that's what in law is called embezzlement."

* * * *

"The learned counsel is right in his position, and if he can show precisely at what moment it was done, and that the prisoner was not there when he did it, and if so he could not do it. We cannot divest ourselves of common sense in courts of justice."

* * * *

"What passes at the moment is the best evidence of what the mind feels at the instant."

* * * *

It is further recorded of Arabin that in sentencing a man to a comparatively light punishment, he used these words:

"Prisoner at the bar, there are mitigating circumstances in this case that induce me to take a lenient view of it; and I will therefore give you a chance of redeeming a character that you have irretrievably lost."

* * * *

Arabin was very near-sighted and also very deaf. On one occasion he unluckily took up a set of depositions which had no reference to the prisoner at the bar; the charge against him being that of stealing a pocket-handkerchief, while the judge's attention was fixed upon a charge of stealing a watch. Holding the abortive writing close to the light, and peering at it through his spectacles, he began his examination.

ARABIN: "Well, witness, your name is John Tomkins."

WITNESS: "My Lord, my name is John Taylor."

ARABIN: "Ah! I see you are a sailor, and you live in the New Cut."

WITNESS: "No, my Lord, I live at Wapping."

ARABIN: "Never mind your being out shopping. Had you your watch in your pocket on the 10th of November?"

WITNESS: "I never had but one ticker, my lord, and that has been at the pawn-shop for the last six months."

ARABIN: "Who asked you how long you had had the watch? Why can't you say yes or no! Well, did you see the prisoner at the bar?"

WITNESS: "Yes, of course I did."

ARABIN: "That's right, my man, speak up and answer shortly. Did the prisoner take your watch?"

WITNESS (in a loud tone): "I don't know what you're driving at; how could he get it without the ticket, and that I had left with the missus."

Arabin, who heard distinctly the whole of the last answer, threw himself back in his chair, adjusted his glasses, and glared at the witness box with a look of disgust. At last he threw the depositions to an elderly counsel who was seated at the barrister's table, and said:

"Mr. Ryland, I wish you would take this witness in hand, and see if you can make anything of him, for I can't."

Now Ryland had been dining; and as he

was one who never failed in doing honor to everything in the line of eating and drinking, he was in rather a confused state of mind. Nevertheless he stood up, glared ferociously at the unlucky witness, and, turning to the judge, observed :

"My lord, it is my profound belief that this man is drunk."

"It is a remarkable coincidence, Mr. Ry-

land," said the Judge, "that is precisely the idea that has been in my mind for the last ten minutes. It is disgraceful that witnesses should come into a sacred court of justice like this in such a state of intoxication. Mr. Clerk, don't allow this witness one farthing of expenses. I'll put a stop to this scandal if I can."

THE DYVOUR'S HABIT.

A CURIOUS feature of the old bankruptcy law of Scotland is recalled by Mr. H. G. Graham, in his recently issued work, *Social Life in Scotland in the Eighteenth Century*, when he mentions the singular costume worn by insolvent debtors, who, he says, went about "clad in strange piebald attire—bonnet and hose half yellow, half brown." This fantastic garb, which stamped the wearer as a kind of social pariah, was known as "the dyvour's habit"—the term "dyvour," whose derivation is not quite clear, being given to a person who, in the expressive language of the law, was "drowned in debt." Its history is not without interest as exhibiting the slow growth in Scotland as elsewhere of the humaner treatment of insolvent persons, which only in our own day has been fully exemplified.

The beneficent process of *cessio bonorum*, which did so much for the amelioration of the Roman debtor, was early imported into the law of Scotland. On making a full surrender of his goods for the benefit of his creditors, a debtor was entitled, under certain conditions, to liberation from prison and to protection from re-arrest. Various enactments dealt with the conditions under which this privilege was granted, but these may be shortly stated thus: The debtor must first have suffered a month's imprisonment before he was entitled to present his petition craving the benefit of the *cessio*; he was obliged to

state the misfortune or accident to which he attributed his insolvency, and to make a full disclosure on oath of his estate; he was further bound to declare that since his imprisonment he had made no conveyance of his property to the prejudice of his creditors, and if he had made any such prior to his incarceration he was required to give full details; and, lastly, he had of course to make a complete cession of all his property. Assuming he could comply with these requirements, he was entitled to be set at liberty, but he might be called upon to wear "the dyvour's habit" as a punishment for the offence of not being able to pay his debts! The idea of thus humiliating and disgracing the insolvent seems to have been borrowed from France, between which country and Scotland there subsisted, as is well known, a close intimacy for several centuries—an alliance which has in many ways left durable traces in Scotland even to the present day. In 1592, a law was passed in France compelling the *cessionnaire* to wear a *bonnet vert*, and in 1605, we find that an Act of Sederunt or Rule of Court was issued by the Court of Session requiring the magistrates of Edinburgh to erect a pillar near the market cross with a seat upon it, "quhair-upon, in time coming, sall be sett all dyvoris, and sall sitt thairon ane mercatt day from ten hours in the morning till ane hour after dinner; and the saidis dyvoris, before thair lib-

erty and cuming furth of the tolbuith of Edinburgh, upon thair awn charges, to cause mak and buy ane hatt or bonnet of yellow coloure to be worn be them all the tyme of thair sitting on the said pillerie, and in all tyme thereafter, swa lang as they remane and abide dyvoris, with speciall provisioun and ordinance, if at any time or place after the publication of the said dyvoris, at the said mercatt-croce, ony person or personis declarit dyvoris, beis fundin wantand the foresaid hatt or bonnet of yellow coloure; toties it sall be lawful to the baillies of Edinburgh, or ony of his creditors, to tak or apprehend the said dyvour, and put him in the tolbuith of Edinburgh, thairin to remane in sur custodie the space of ane quarter of ane yeir for ilk fault and fellie foresaid." Fifty-four years later a further Act of Sederunt was promulgated which cast upon the unlucky dyvour the indignity of being required to wear the whole habit, half yellow and half brown—an obligation which the court was directed by a statute of 1696 to see faithfully observed unless the debtor could allege and prove that his insolvency was due to innocent misfortune.

The court had occasionally, it would appear, granted relief in this matter; for the future no such favor was to be shown except in the case specified. So matters remained for many years; insolvents, of whom there were many, thus having their disgrace publicly advertised by themselves. Towards the end of the eighteenth century, however, public opinion was slowly forming against the harsher measures dealt out to debtors in former times, and one direction in which this was shown was the greater disposition to disregard the act of 1696 and to dispense with ordering the wearing of the obnoxious dress. The latest case in which we have discovered that the court enforced its use is *Dick v. Morison*, in 1775 (*Morison's Dictionary of Decisions*, 11,791), in which, the insolvency being attributable to smuggling, the court declined to grant a dispensation from the wearing of the habit. Still, however, this relic of a barbarous time remained part of the law of Scotland, and it was not till 1836, by the statute 6 and 7 Will. 4, c. 56, that it was dismissed into the limbo of things that were.

—*Law Times.*



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FACETIÆ.

A PHYSICIAN once called on Sergeant Murphy to consult him about calling out someone who had grossly insulted him. "Take my advice," said Murphy "and instead of calling him out, get him to call you in, and have your revenge that way; it will be much more secure and certain."

A GERMAN had been accepted as a jurymen. He desired to be released on the ground, "I no understand good English." "That is no excuse," said the judge. "You will not hear any good English during this trial."

IN THE West of Ireland on a certain circuit a judge was wont to doze during the speeches of counsel.

On one occasion counsel was addressing him on the subject of certain town commissioners' rights to obtain water from a certain river, water being very scarce at the time. During his speech he made use of the words:

"But, my Lord, we must have water—we must have water."

Whereupon the Judge woke up, exclaiming: "Well, just a little drop—just a little drop! I like it strong."

NOTES.

IN WASHINGTON county, Iowa, not long ago, a justice was called in to perform a marriage ceremony. After the wedding feast and the health of the couple had been drunk, it developed that the groom had a wife living in the state of New York much to the chagrin of the relatives of the bride. The justice thought over the matter a minute and finding nothing in Conkling's justice practice he was sure it was common law and so

at a late hour he assembled all the guests once more and unmarried the couple charging another fee. Some of those present objected to this singular ceremony, but the justice insisted as he had right to marry the couple he saw no reason why he could not unmarry them, it was a poor law that failed to work both ways.

I ONCE spent an afternoon in a pleasant little villa on the banks of the river Marne, with the former chief of police in the time of Napoleon III., up to the proclamation of the republic. No one would have thought, to look at the peaceful figure of the proprietor, a little man in sabots, with gray beard *à la* Millet, absorbed in cultivating the magnificent hortensias that covered his terraces, reaching to the water's edge, that his head had been a storehouse for all the machinations and turpitudes of that period of decadence which ended in a disastrous war and a revolution. It was on that afternoon that I learned how the fatal Ollivier ministry was decided upon by M. Thiers and his political friends one evening in the conservatory of a beautiful French woman, living not far from the Opéra. Two brothers, well known in the best Paris society, meanwhile distracted the attention of the guests in the salon by slight-of-hand tricks and gymnastic feats on a Persian rug. And when I asked the old man how he knew all this with such precision, "From a *femme de chambre*," he answered, tranquilly, "All personages of importance at that time, at their own request, took their servants only from my hand." — *Harpers Weekly*.

To the suggestion of counsel *ir. Pearce v. R. R.*, 124 N. C. that the court could not understand and properly determine the case unless the action were translated into one of the old common-law forms of actions, and that when that was done it would be seen that the action could not be maintained, Clark, J., observes, "this suggestion has its precedent in the physician who, in a difficult case, proposed to give his

patient something to throw him into fits, on the ground that he was infallible in curing fits."

GENERAL Joubert was among the many lawyers who have forsaken their professional calling to play a great part in their country's history. Like Ireton and Whitelock, and several other prominent figures in the Parliamentary struggle of the seventeenth century, he was a lawyer before he became a soldier. He held the office of Attorney-General in the first South African Republic, and is said to have acquired a great reputation as a cross-examiner.

IN these days of constitutional discussion, when the status of organized and unorganized territory of the United States is a subject of spirited dispute, peculiar interest attaches to a decision of the federal Supreme Court interpreting these clauses of the constitution which provide for trial by jury. It is no longer an open question that in criminal cases verdicts must be unanimous in territorial courts as well as in state courts. But whether states and territories are bound to furnish common-law juries has till now been a mooted point. According to a decision in a Utah case, however, the states have the power to enact legislation reducing the number of men on a jury. The constitution of Utah provides that, except in capital cases, a jury shall consist of eight men only, while in cases of inferior jurisdiction four men are made to constitute a jury. In civil cases three fourths of the jurors may return a verdict, and in criminal cases unanimity is the rule. Another provision is that in all criminal cases except capital ones the authorities may proceed by information instead of by indictment at the hands of a grand jury.

A man convicted of robbery by a jury of eight and upon information instituted *habeas corpus* proceedings in the federal courts, claiming that he was being deprived of his liberty without due process of law. This contention was based on a construction of the federal constitution, which the Supreme Court has now repudiated. It is held that a jury does not necessarily consist of twelve men, and that a trial by a jury of eight is a legal and constitutional trial. Justice Harlan has dissented from this view. He pointed out that if a state can reduce the jury in criminal

cases from twelve to eight, it can reduce it still further, and an unlimited right of reduction involves the power to destroy trial by jury altogether. There may be no magic in the number twelve, but if a jury does not mean twelve men, what is the meaning of the term as used in the federal constitution? How far can the common-law number be reduced without violation of the rights of the accused? What article in the constitution could be cited to invalidate legislation reducing the number of men on a jury to three? These queries are not answered by the recent decision.

The right of counsel to shed tears before the jury was recently decided by the supreme court of Tennessee in the case of *Ferguson v. Moon*, which was a case for breach of promise. The court, speaking through Judge Wilkes, said:

"It is assigned as error that counsel for plaintiff in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, shed tears and thus unduly excited the passions and sympathies of the jury in favor of the plaintiff and greatly prejudiced them against defendant.

"Bearing upon this assignment of error we have been cited to no direct authority and after diligent search we have been able to find none. The conduct of counsel in presenting their cases to juries is a matter which must be left largely to the ethics of the profession and the discretion of the trial judge. Perhaps no two counsel observe the same rule. Some deal wholly in logic and legal argument, without any embellishment whatever. Others use rhetoric and occasional flights of fancy and imagination. Others rely upon noise and gesticulation, earnestness of manner and vehemence of speech. Others appeal to the prejudices, passion and sympathies of the jury. Others combine all these modes with various accompaniments of different kinds.

"No cast-iron rule should be laid down. To do so would result that in many cases clients would be deprived of the privilege of being heard at all by counsel. Tears have always been considered legitimate arguments before the jury, and we know of no power or jurisdiction in the trial judge to check them. It would appear to be one of the natural rights of counsel which no statute or constitution could take away. It is certainly

a matter of the highest personal privilege. Indeed, if counsel have tears at command it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they are indulged in to such excess as to impede, embarrass or delay the business before the court.

"In this case the trial judge was not asked to check the tears, and it was, we think, a very proper occasion for their use, and we cannot reverse for this reason; but for other errors indicated the judgment is reversed and cause remanded for a new trial."

An Iowa attorney advertises himself as follows:

"Am the legal redheaded Napoleon of the slope. Have no Waterloos. Freckled somewhat, but temperature steady. Paradise to me is a lawsuit at white heat. Always legally armed and in the saddle. References given. A willing payer is nature's noblest effort.

"Practice in every court in the Western hemisphere; perfects titles, and buys and sells mortgages, makes loans and collections. Am the redheaded, scar-faced, freckled, begrimed Legal Napoleon of the slope and always in the saddle. Active as the wild untamed feline; fierce as a lion and gentle as a lamb, 'and with good advice make war.'

"'Brethren as much as in you lieth live peaceably with all men.' Give me stalled ox."

INTERESTING GLEANINGS.

FROM Russia comes the news, according to a note in Popular Science News, that Professor Norshewski has invented an instrument the principle of which is the sensitiveness to light of selenium and tellurium, both of which change their quality as conductors of electricity with a variation in the light to which they are exposed. "In stating that the blind can see by this instrument, a relative meaning only is indicated. While their actual vision will be unaffected, they will feel the various effects of changing light by its action. It is claimed that a totally blind man has been enabled to find the windows in a room, and after some practice to distinguish approaching objects. The inventor hopes to make the instrument so efficient that the blind will be able to tell almost certainly when they

are approaching an opaque or transparent substance."

LITERARY NOTES.

EX-PRESIDENT GROVER CLEVELAND opens the June ATLANTIC with the first of his recent Princeton addresses on "The Independence of the Executive," which have been so eagerly awaited by the public. The present paper traces the history of the relations between the President and Congress, and prepares the way for the discussion in July of his own controversy with Congress in 1886, from which, as is well known, he emerged triumphant.

C. A. Conant in "Recent Economic Tendencies" gives a thoughtful analysis of the changes now arising and likely to arise hereafter from the recent alterations in the relations of labor and capital, and discusses the future of combinations, either state, industrial, or by capital.

GENERAL CHARLES KING, who, as Captain King, is known as one of the most popular novelists of the day, has achieved a new success in the complete novel published in the June NEW LIPPINCOTT. "Ray's Daughter: A Story of Manila," is second to none that he has written. The heroine is the daughter of "Billy Ray," famous among Captain King's past creations. She goes as a Red Cross nurse to the Philippines, where she is wooed by a gallant American volunteer, who has by no means an easy time of it, but whose perseverance bears fruit at last. A fine etching of General King, taken in uniform, appears as a frontispiece in this number.

In the department of pure literature, the current CENTURY is notable as containing hitherto unpublished poems by James Russell Lowell, and new poems by Edmund Clarence Stedman and Thomas Bailey Aldrich. Governor Roosevelt writes with deep conviction of reform and reformers, putting in a plea for compromise or "agreement," and warning practical reformers that they must not only fight the bad opposed to them, but ignore the quixotic good. Related to this article is one on the need of reform in the consular service, by Harry B. Garfield. The origin of "the Lincoln Rail" in the campaign of 1860 is described by one who heard the story from ex-Governor Oglesby, its originator. Miss Dorothea Klumpke, the American astronomer, tells of her night ride in a balloon, last November, from Paris to the coast, in unsuccessful quest of leonids; Richard Whiteing writes, with Gallic lightness, of life on the boulevards in his series on the Paris of to-day; and Charles de Kay chats of Hubert Vos's

portraits of typical natives of China, India, Hawaii, Java, etc. Four of these portraits are reproduced. The number abounds in fiction, including Dr. Mitchell's "Dr. North and His Friends," and five short stories, two in different keys by Albert Bigelow Paine, and the other three having political bearings: "Conlon," by Arthur Colton, showing the relationship of a "heeler" with his "boss"; "The Mouse," a story of the Washington diplomatic corps, by Lucy Nowell Clark, a new writer, and a satire by Stewart Chaplin, entitled "The Stained-Glass Political Platform."

SCRIBNER'S MAGAZINE for June opens with an article appropriate to the season of national conventions. It is entitled "How a President is Elected," and gives a view behind the scenes of the way in which the great machinery of a presidential election is put in motion. The author, A. Maurice Low, is a Washington correspondent who has had every facility to see the workings of a campaign. A brilliant series of pictures fully illustrate the narrative. Another article of national interest is "Are the Philippines worth having?" by George F. Becker, a United States geologist who recently spent more than a year in the islands. This article is a very clear exposition of the mineral, industrial and agricultural possibilities of the islands, with an account of their climate and the characteristics of the people. It contains more valuable condensed information about the islands than has heretofore appeared, and is fully illustrated from recent photographs. Mr. Richard Harding Davis has been following General Buller's column, and his first article is published in this number, describing the battle of Pieter's Hill. Mr. Davis's admirable qualities as a descriptive writer and his experience as a correspondent in three wars enable him to present as vivid a picture as possible of the great fight between the Boers and the British just before the relief of Ladysmith.

WHAT SHALL WE READ?

Under the title of "The Temple Primers," the Macmillan Company are issuing a series of small volumes of condensed information introductory to great subjects, written by leading authorities adapted at once to the need of the general public, and forming introductions to the special studies of scholars and students. The series will include the chief departments of literature, science and art. Among the volumes already published are *An Introduction to Science* by Dr. Alexander Hill and *Roman History* by Dr. Julius Koch. The low price, forty cents a

volume, brings the series within the means of all readers. The size is most convenient, the type good, and the illustrations excellent.

The Bennett Twins just published by the Macmillan Company, is by Grace Marguerite Hurd, who has for sometime been on the staff of the Boston Transcript, of which paper her father is the literary editor. *The Bennett Twins* is a story of student life in New York and many of the characters are likely to be recognized by artists who have worked in the studios of the more famous masters of New York, though the author disclaims actual autobiography or portraiture.

The Banker and The Bear, a Story of a "Corner" in Lard, is the title of a novel by Henry K. Webster, which comes from the press of the Macmillan Company. Although Chicago is not mentioned in the book as the scene of action, the Chamber of Commerce of that city is the point round which the action centers. The Bear and the Banker are chums. The Bull is financed by the Banker in the endeavor to run the "corner" in lard, and the story derives its title from the necessity found by the Bear for the ruin of his chum the Banker, in order to upset the financial schemes of the Bull. A stirring love story threads its way through the financial excitement of the book. Those who have read "The Short-Line War" will remember Mr. Webster's skill in plots. Though a very young man, he has cleverly seen and seized upon the possibilities of romance which lie in the hazardous financial and commercial struggles of some western millionaires.

In *Politics and Administration*,¹ Mr. Goodnow, from a consideration of political conditions as they now exist in the United States, demonstrates that the formal governmental system as set forth in the law is not always the same as the actual system. He also attempts to indicate what changes are necessary to make the actual system conform more closely than it does at present to the political ideas upon which the formal system is based. The book is an able discussion of a subject in which every citizen is deeply interested.

Mrs. May Alden Ward, whose "Old Colony Days" has made her name familiar to a host of readers, has just written three delightful essays on Carlyle, Ruskin and Count Tolstoi. In these she not only summarizes the ideas for which their works stand,

¹ POLITICS AND ADMINISTRATION. By Frank J. Goodnow, A. M. LL. D. The Macmillan Company, New York, 1900. Cloth. \$1.50.

but also gives charming personal glimpses of the lives of the writers. *Prophets of The Nineteenth Century*,¹ the title under which these essays are published, is a book well worth the reading and one which will stimulate an interest in this field of literature.

The reader fond of adventure and highly dramatic situation will find *A Dream of a Throne*,² a story which will command his interest from beginning to end. The scene is laid in Mexico, and the plot deals with a popular Mexican uprising in 1845. Vicente, the hero, and the leader of the revolt, is the son of the last daughter of the ancient royal house which, in the province whose capital is Guadalajara, corresponds to the house of Montezuma in the Aztec capital. Opposed to him is Rodrigo, an American in the service of the Mexican government.

The writer has a thorough knowledge of Mexican life, and his descriptions of both people and scenery are vividly drawn. We commend the book as an excellent companion for a leisure hour.

NEW BOOKS FOR LAWYERS.

THE ORGANIZATION AND MANAGEMENT OF A BUSINESS CORPORATION. By THOMAS CONYNGTON of the New York Bar. The Lawyers' Co-operative Publishing Co., Rochester, N. Y., 1900. Cloth. \$1.50.

The work is prepared with special reference to the laws of New York, New Jersey, Delaware and West Virginia and shows the comparative advantages of the laws of these States.

It is a work for lawyers, business men, stockholders, directors and officers of companies. It shows what businesses, and under what circumstances it is advisable to incorporate, and compares the advantages of corporate management with the disadvantages of partnerships, telling also how to guard against the dangers of corporate management. It gives the requisites of the charter, complete by-laws, and all the details of organization and management of corporations under the laws of the four States where most corporations are organized at the present time. It is a compact, concise and accurate handbook of information, giving in plain, untechnical language, a summary of the leading features of cor-

¹ PROPHETS OF THE NINETEENTH CENTURY. By May Alden Ward. Little, Brown & Co., Boston, 1900. Cloth. 75 cents.

² A DREAM OF A THRONE. The story of a Mexican revolt. By Charles Fleming Embree. Little, Brown & Co., Boston, 1900. Cloth. \$1.50.

poration laws, and will save time, money and trouble to all who have anything to do with corporations.

A TREATISE ON THE LAW OF EXECUTIONS IN CIVIL CASES and of proceedings in aid and restraint thereof. By ABRAHAM CLARK FREEMAN. Third edition. Bancroft-Whitney Co., San Francisco, 1900. Three vols. Law sheep. \$18.00.

"Good wine needs no bush," and it seems almost an act of supererogation to add words of praise and commendation for this treatise by Mr. Freeman. For twenty-four years it has been regarded as the work upon this subject and each successive edition has added to its value and completeness. In its present form, with an enlargement of the text more than one half, it covers all the decisions of importance down to date, and is the most thorough and exhaustive presentation of the law extant. The profession owes much to Mr. Freeman and he is continually increasing its indebtedness by his labors in their behalf.

A TREATISE ON THE AMERICAN LAW OF REPLEVIN, and kindred actions for getting possession of chattels. By ROSWELL SHINN, LL. D. T. H. Flood & Co., Chicago, 1899. Law sheep. \$6.00, net.

No recent publication is more deserving of hearty welcome from the legal profession than this treatise of Mr. Shinn's. The work exhibits a most thorough research and discriminating judgment on the author's part, and should, and undoubtedly will, be accepted as a standard authority upon the subject of which it treats. It is a complete presentation of the general principles of the common law of replevin as modified by the state statutes and the construction and application of the same by courts of review.

To make the finding of the individual state law more expeditious the notes are arranged alphabetically according to the names of the states, where no particular reference to other matter makes the same inadvisable. The general index makes special reference, under the state name, to the subject-matter pertaining to that special state when the same differs from the general rules. In addition to this feature, the table of contents refers to the subjects of chapters, and at the heads of the chapters themselves are placed tables of the sections contained therein. This makes the finding of any branch of the subject, together with its kindred and relevant subject, easy, quick and sure. Furthermore, much care has been exercised in making the sections themselves treat

directly of the subject-matter named in the heading, connecting the same by cross references to other and relative matters. In this way repetition, confusion and obscurity are avoided, and the one volume is made to contain the matter of two.

THE LAW OF EXPERT AND OPINION EVIDENCE, reduced to rules with illustrations from adjudged cases. By JOHN D. LAWSON, LL. D. Second edition revised and enlarged. T. H. Flood & Co., Chicago, 1900. Law sheep. \$6.00, *net*.

The great number of cases involving the admissibility of expert and opinion evidence prove the importance of this subject. Since the publication of the first edition of this work in 1883, the number of such cases has more than doubled. Mr. Lawson, unlike many law writers, is not content to give a simple digest of the law, but he presents the principles which have been laid down by the courts in the form of rules with illustrations and reasons, and endeavors, so far as possible, to bring the law upon the subject to complete unity and settlement. The author's name, is a guaranty that his work has been thoroughly and exhaustively performed, and the treatise is one which will commend itself to every practicing lawyer.

THE LAW OF ELECTRIC WIRES in streets and highways. By EDWARD QUINTON KEASBEY of the New Jersey Bar. Second edition, revised and enlarged. Callaghan & Co., Chicago, 1900. Law sheep. \$4.00.

This subject is one which is rapidly growing in importance and involves many questions calling for judicial settlement. Since the first edition of this work (issued some eight years ago) many of the questions therein discussed have been definitely settled and new and equally perplexing points have become the subject of controversy. The present edition brings the work fully down to date and the work may be considered as authority upon the present status of the law.

NEW OHIO CITATIONS. A complete table of Ohio cases. By J. W. Thompson. The Bowen-Merrill Co. Indianapolis, 1900. Law sheep. \$10.00.

This volume covers all the Ohio cases reported officially and unofficially from 1816 to 1900, from the Supreme, Circuit, Superior, Common Pleas, Probate

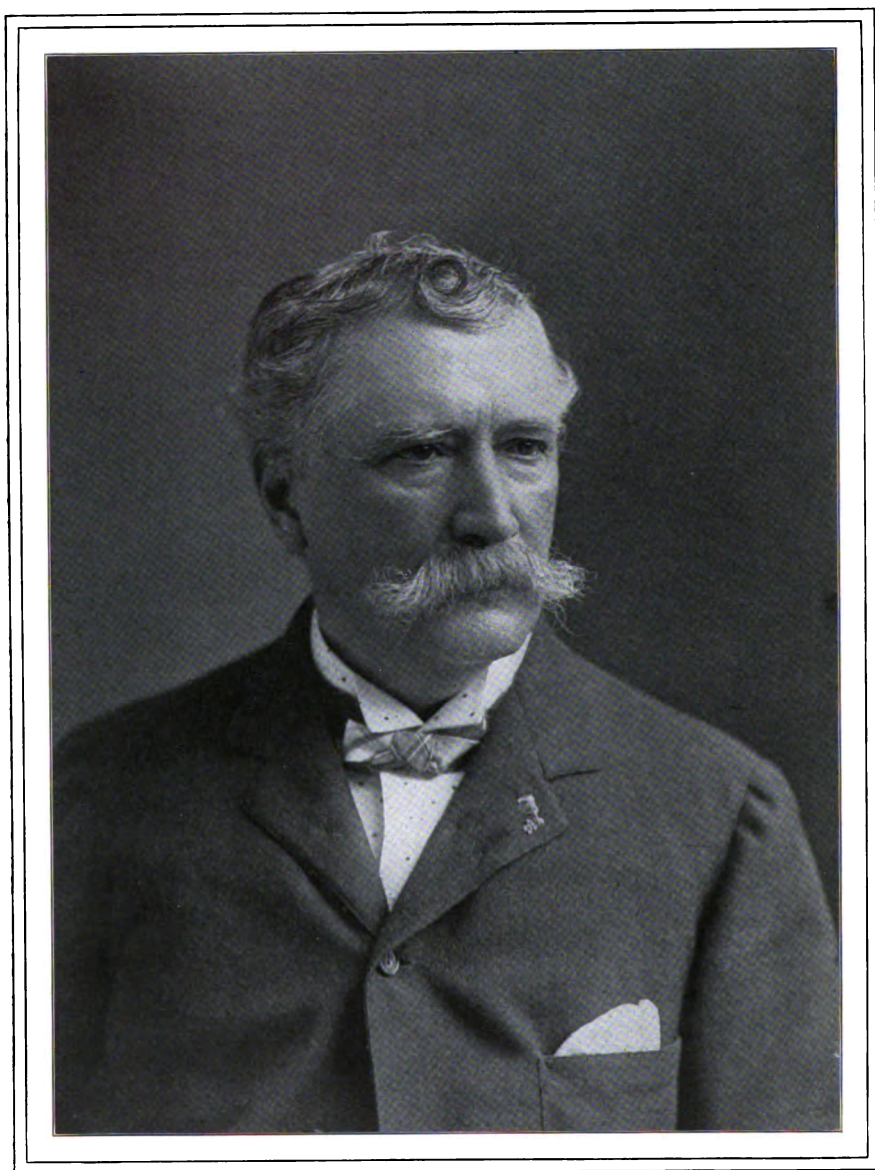
and Federal Courts, with all subsequent citations showing all cases cited, overruled, modified, doubted, criticised, distinguished, explained, disapproved or changed by statute and all foreign cases cited. In addition to all this a statement is given of the point of law upon which each case is cited. The work will be invaluable to Ohio practitioners and will be needed as a book of reference in all law libraries.

THE LAW OF BAILMENTS embracing deposits, mandate, loans for use, pledges, hire, innkeepers, and carriers. By EDWARD BEAL, B. A., of the Middle Temple. Butterworth & Co., London, England. The Casswell Co., Ltd., Toronto, Ont. 1900. Cloth. \$8.25.

It is now considerably more than a century (1781) since Sir William Jones wrote his essay on the law of bailments and it is singular that since the last edition of this essay (1833) no *English* writer has published a new book upon this important subject. No wonder then that Mr. Beal has found ample excuse for presenting to the legal world the present treatise. The work is admirable in every way and is an exhaustive exposition of the English law of bailments. The leading cases are arranged as far as possible in chronological order, thus giving the history and evolution of the law; and as the English judicial statements are given *ipsissimis verbis*, to which are added occasional extracts from well known text books, the practitioner is saved much time and trouble. The author has, as he says, "concerned himself more with the *reason* and *spirit* of cases which make law, and the statement of general principles than with the facts." The treatise will be welcomed not only by the English Bar, but will undoubtedly be accepted and recognized as a standard authority by the American bench and bar.

NOTES ON THE UNITED REPORTS, Vol. VI. A brief chronological digest of all points determined in the decision of the Supreme Court, with notes and citations. By WALTER MALINS ROSE of the San Francisco Bar. Bancroft-Whitney Co., San Francisco, 1900. Law sheep. \$6.50.

There is no apparent falling off in the quality of Mr. Rose's work, as this series progresses. Notes and citations are prepared in a most thorough and exhaustive manner and are veritable mines of valuable information. The present volume covers cases reported in 24 Howard, 1-2 Black and 1-7 Wallace. If any of our readers are not familiar with this series, we advise them to become so at once.



FREDERIC C. BREWSTER.

The Green Bag.

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BOSTON.

AUGUST, 1900.

FREDERIC CARROLL BREWSTER.

BY CHAS. B. CONNOLLY.

THE truly great never die. To the parent dust may their mortal frames return, but their memory remains forever, and like the distant star continues to illumine the paths of future generations ages after their native brilliancy has died out.

It is little more than a year since Philadelphia lost one of its leading citizens, ex-Judge Frederic Carroll Brewster, but though he is no longer present with us his spirit still animates the legal profession of his city.

The ancestry of a great man is always a point of interest, for heredity no less than environment lends wonderful force to the moulding of character. Elder William Brewster, one of the original Pilgrim Fathers, is the earliest progenitor of the late judge of whom we have any trace. His descendants settled throughout the Eastern and Middle Atlantic States. Francis Enoch Brewster, the judge's father, was born in Deerfield, N. J., but received his education in Philadelphia. In this latter city he was admitted to the bar and subsequently attained to quite a height of fame; his practice was very extensive and brought him ample returns in the way of money.

The subject of this sketch first saw the light of day in Philadelphia, May 15, 1825. From his earliest youth he gave promise of a brilliant future. The Old Friends Select School, at Fourth and Arch Streets, now famous in story as in history, was the place where young Brewster first learned wisdom at its font. Here he made all the preliminaries with ease, and in due course of time was ready to enter college. It fell to the good

fortune of the University of Pennsylvania to be the Alma Mater of the young aspirant for learning. This institution was then located on Ninth Street, and was under the direction of the Rev. Dr. Ludlow. He here displayed the same talents and industry that had marked his earlier schooldays, and graduated honorably in 1841, being then only sixteen.

Having laid the foundation of a good classical course he began to study law in the office of his father, and in September, 1844, was admitted to the Philadelphia Bar. From this day to that of his death his life was one of constant activity. It was during his early years of legal practice that he won distinction as a criminal lawyer, his later years being more devoted to the civil courts.

One of his early cases that served to establish his reputation in criminal law was that of Samuel Cunningham, a policeman charged with murdering James McCrory. The latter was a mechanic whom Cunningham was sent to arrest. Upon arriving at his workshop Cunningham found the man intoxicated. He refused to submit to the officer of the law, and attacked him with a knife. Cunningham shot his adversary and the wound proved fatal. The chief point in the trial was to determine the limit of the exercise of the right of self-defense. Lawyer Brewster claimed that a well-founded fear of the assailant's intent to inflict bodily harm is sufficient ground for the exercise of this right even to the extent of taking the assailant's life. Ethically the doctrine is perfectly sound, but it required all the young attor-

ney's skill to establish it as a precedent in the courts.

Upon the same principle he secured the acquittal of Lenairs accused of murdering a farmer who had threatened to shoot him for trespass.

But more remarkable than either of these was the victory he achieved in the Kirkpatrick poisoning case. He won this case against all odds. It is not so remarkable a thing for a lawyer to come off triumphant in a noted criminal case when the newspaper world and public opinion are in his favor, but to come off victorious in spite of press and people is the lot of but few. Yet this case was won in the face of such opposition.

But his greatest success and what proved the stepping stone to higher things in his case was his termination of the contest between William B. Mann and Lewis Cassidy. The bone of contention was the office of District Attorney and the date of the event 1856. The case occupied the courts for months and was of as much importance relatively speaking, as the Tilden-Hayes contest. The case was finally decided in favor of Mr. Mann, who ever after cherished the highest good will and friendship towards his counsel. An unexpected reward followed this victory, for, unasked and wholly unexpected, his name was announced for the City Solicitorship. Party feeling was submerged in admiration and, the people knowing well the benefit such a holder would confer upon the office, he was elected by an overwhelming majority. He occupied this position for two terms. Afterwards he served for three years on the Common Pleas bench, resigning to accept an appointment as Attorney General of the Commonwealth, made by Governor Geary.

The legal lore of Pennsylvania received several valuable contributions from the pen of this eminent statesman, eleven volumes in all. That he was able to find time for such work is to be attributed solely to the magic of the man's methods.

The case of Stephen Girard's will con-

trasted the oratory of the great Daniel Webster with the legal acumen of Frederic Carroll Brewster, and while the latter's victory was not welcomed by all, it will ever remain as a testimony to his greatness. The same may be said of his subsequent conduct as solicitor of the Girard estate. To him is due the defense of this great property—but Philadelphians are yet undecided as to the advantage of such a vast extent of enclosed ground in the center of the city. The confusion of streets resulting from the location of Girard College is regarded with disfavor by many of the inhabitants who take pride in the almost mathematical precision of their city's thoroughfares, yet all are willing to admire the skill of the advocate who thwarted the ordinance of councils and the plans of real estate brokers.

It is difficult sometimes to conceive of a modern professional man as refined. The continual contact with men of all classes, the rush and bustle of legal proceedings, all tend to dull the finer sensibilities and make a man precise and exacting rather than genial and affable; yet wherever you met Judge Brewster, whether at his office or in court, as an officeholder or a citizen; in business or at home—he was always the same—a perfect gentleman. He was never impatient or arrogant to a legal adversary nor overbearing as a victor. He was kind to all—and therefore beloved by all.

According to his own statement there was an incident in his early legal life that had great after-effect upon his conduct. While he was studying law in his father's office he was requested by his parent to present a petition for signature to various men connected with the Philadelphia Bar. The petition was one to the Legislature requesting the repeal of an obnoxious Act of Assembly. A list of the signatures wanted was given to young Brewster and he started to fulfil his mission. The first name was no less than that of the great Horace Binney. A feeling of awe came over the young student as he

opened the office door and told a genial-faced gentleman that he wished to see Mr. Binney. "That is my name," came in cheerful tones from the gentleman. "What can I do for you?" The pleasant surprise at finding a great man so affable to a stranger youth having passed away, the latter told the object of his visit. "It is a very wise petition, and one which every member of the bar should sign; but, my dear young sir, before I sign the same, I must ascertain whether or not the date of the act is correctly set forth in the petition and whether or not the title as the petition states it is *verbatim* with the statute books." "But," exclaimed the young man, somewhat emboldened at his kind reception, "my father drew up the petition and there is his signature appended to it. Is not that sufficient?"

"No doubt, my dear young sir, but in such matters I do not like to accept even possible responsibilities of inadvertent mistakes and therefore depend entirely upon myself." Then consulting his office library he verified the citation, appended his signature and bade a hearty good-bye to his young acquaintance.

Young Brewster's next call was upon Mr. Seargeant, who received him with great kindness, but, notwithstanding the signatures of the elder Brewster and Horace Binney, he too looked up the citation before signing his name, saying that he never trusted such a thing to another.

After narrating this incident the late Judge said it taught him two lessons: Always to be kind to those beginning their study of law, and in legal matters never to depend upon his own memory nor another's word, but always to investigate for himself. That he learned these lessons well, his whole life is a proof.

There were circumstances connected with ex-Judge Brewster's death that rendered it very pathetic. For some weeks previous he had been feeling unwell, suffering from an attack of asthma. His indisposition did not cause him to relinquish business duties, and

but two days before the end came he attended the City Solicitors' Convention and, after an eloquent speech, nominated Mr. Kinsey, the present incumbent, for that office. The weather was very cold and the building unheated, and the physical effort was too much for the invalid's overtaxed system. He had already intended to go South for his health, and this fresh attack made him determine to go at once. On Thursday, December 29, 1898, he left Philadelphia. During the night he grew much worse and died on the train at Charlotte, N. C. Thus passed away one of the greatest men that has ever adorned the legal profession in Philadelphia.

Frederic Carroll Brewster was an unique character, an individual separated from the ordinary lawyer by his manner, his ability — in short, by his own personality. His was a nature that could stand upon the heights of authority and not become dizzy; one that could receive honors with due appreciation and yet remain unchanged; one that was never unduly elated by a life of constant successes. The last generation furnished many eminent jurists, and if the testimony of men is to be valued F. Carroll Brewster is entitled to the first place in a line of leaders. No man ever enjoyed higher honors, socially, professionally or politically than he, nor has there ever been one whose memory will be more deeply venerated, nor one whose loss is more keenly felt.

His life is well summarized in the announcement of his death made in the Supreme Court of Pennsylvania by Hon. S. G. Thompson: "I have been designated this day to perform the sad duty of announcing the death of the Hon. F. Carroll Brewster. For nearly half a century he has been conspicuous in the affairs of our city and our commonwealth. As City Solicitor he represented our municipality and, as such, carefully and thoroughly guarded her interests. As a judge of the court of common pleas of our county, he performed the judicial functions with an ability which placed him in front

rank of our distinguished judges. As Attorney-General he brought to the performance of the duties of that office the learning and ability that made the office itself conspicuous. I do not exaggerate when I say that in the performance of duty he reached the highest standards and never sank into mediocrity. It is difficult to fill the void occasioned by his death. By it the city suffers a loss; by it the commonwealth suffers a loss; and by it our profession loses a splendid exemplar of ability and learning. I am

sure that I do not exceed the just limits of eulogism when I say that he was a brilliant orator, he was a learned lawyer, he was a distinguished judge, and he was above all an accomplished and attractive gentleman."

The Associated Students, Lawyers Club of Philadelphia, and Five O'Clock Club of Philadelphia have joined in preparing a memorial volume to the late ex-Judge which will shortly appear. This is one of the greatest tributes that can be paid to his memory.

CHAPTERS FROM THE BIBLICAL LAW.

IV.

THE MANSLAYER IN THE CITY OF REFUGE.

BY DAVID WERNER AMRAM.

A STEP on the road of law reform is the recognition of the right of sanctuary. In its time this right served a useful purpose in staying the hand of the kinfolk of a murdered man, and giving to the slayer a temporary refuge, pending the judicial determination of the degree of his crime. At common law as well as at Roman law this right was carefully defined and guarded, and we find that in nearly all codes it makes its appearance at a certain stage of legal progress. It arose out of the belief in the protective power of the gods, whose anger would be enkindled against any one violating their holy places. Thus the altar, the sacred groves, the temples, afforded protection to those in danger of their lives, and the wrath of the gods kept the pursuer at a distance.

At an early stage in the history of the Hebrews in Palestine, this notion of sanctuary was already well defined and the Mosaic Code has made use of it in the establishment of cities of refuge as one of the practical methods of checking the blood feud. There

are several references to the institution of the cities of refuge, the principal ones being Numbers, chapter 35, Deuteronomy, chapter 19 and Joshua, chapter 20. We shall take the first of these for our consideration, because it is the most complete, and also because it contains a detailed account of the law of homicide.

It is characteristic of the Mosaic Codes that they all commence with a verse similar to the one with which this statute commences, basing the law about to be promulgated upon a specific divine decree.

And Jehovah spoke unto Moses, saying:

"Speak unto the children of Israel and say unto them, When ye be come over Jordan into the land of Canaan, then ye shall appoint you cities to be cities of refuge for you, that the manslayer may flee thither which killeth any person unawares." There had at all times been sacred places in Palestine, affording refuge to the slayer from the avenger of the blood, but it was not until a late period, during the reign of the kings, when

the country had become unified under monarchical rule that general laws similar to this one were promulgated and enforced. "And they shall be unto you cities for refuge from the avenger,"—the kinsman of the slain man,—"that the manslayer die not until he stand before the gemot for trial." It was the immemorial right of the nearest kinsman of the dead man to avenge the death by killing the slayer wherever he found him; but the enlightened jurisprudence of the time of the kings could not countenance a right so inimical to the peace and dignity of the state and the welfare of the people. Hence these cities of refuge were established, wherein the slayer might be safe. He was not imprisoned, and enjoyed full freedom within the territorial limits of the city of refuge but went beyond its confines at his peril. After the crime had become known to the authorities of the city in which it had been committed, they sent for the slayer who had taken refuge, and brought him under proper escort to their city for trial (Deut. 19: 12). I have translated the word that is commonly translated "congregation" by the word "gemot." The notion of a trial by the "congregation" is misleading because of the modern sense of the word "congregation" which is a departure from its ancient meaning. The council of elders of the city had jurisdiction of the case, and they may be properly called the "gemot" using the word in the sense in which it is familiar to the student of English common law and institutions. The elders were the judicial and administrative authorities in the towns, the public assembly or congregation or the "gemot."

"And of these cities which ye shall give, six cities shall ye have for refuge. Ye shall give three cities on this side of the Jordan and three cities shall ye give in the land of Canaan which shall be cities of refuge." The privilege of sanctuary was not confined to those who worshipped the God of Israel. With extraordinary liberality the ancient code prescribes, "These six cities shall be a refuge

both for the children of Israel, and for the stranger and for the sojourner among them; that every one that killeth any person unawares may flee thither." Inasmuch as the slayer was put on trial it was necessary that the law should define the degrees of the crime of homicide to enable the judges to administer the law fairly, instead of leaving it, as was so commonly the case in ancient communities, to the general sense of justice that may have animated the particular court at the time.

"And if he smite him with an instrument of iron so that he die, he is a murderer; the murderer shall surely be put to death.

"And if he smite him with throwing a stone, wherewith he may die, and he die, he is a murderer; the murderer shall surely be put to death.

"Or if he smite him with a hand weapon of wood, wherewith he may die, and he die he is a murderer; the murderer shall surely be put to death."

These cases which had in all probability occurred frequently before the promulgation of this statute, were now incorporated with the general law by way of illustration. A general law is never particular in pointing out details of cases unless these cases have already arisen. The wilful murderer who had killed in any of these ways was not entitled to a trial. "The avenger of the blood shall himself slay the murderer: when he meeteth him he shall slay him." And the avenger of the blood was not punishable for such slaying of the murderer.

The law then proceeds to further details of the crime: "If he thrust him of hatred, or hurl at him by lying in wait that he die; or in enmity smite him with his hand, that he die; he that smote him shall surely be put to death; for he is a murderer: the avenger of the blood shall slay the murderer when he meeteth him." And now follows the enumeration of the cases in which the killing was not wilful.

"But if he thrust him suddenly without

enmity, or have cast upon him anything without lying in wait, or with any stone, where-with a man may die, seeing him not, and cast it upon him that he die, and was not his enemy neither sought him harm;" in modern phrase, if the killing was accidental and if no motive appears for the crime, "then the gemot shall judge between the slayer and the avenger of the blood according to these judgments." The assembly or gemot having taken the slayer from his city of refuge and placed him on trial, and having found him innocent of murder, "the gemot shall deliver the slayer out of the hand of the avenger of the blood, and the gemot shall restore him to the city of his refuge, whither he was fled." He was sent back as he had been taken, under escort, to protect him from the avenger, and delivered to the authorities of the city of refuge, "and he shall abide in it unto the death of the high priest which was anointed with the sacred oil." The death of the high priest was *ipso facto* a declaration of amnesty, all persons in the cities of refuge then returned to their habitations and the avenger of the blood was forbidden to do them harm. If he killed a slayer after the period of amnesty he was guilty of murder and suffered death. Biblical critics have been puzzled to understand why the death of the king was not made the period of amnesty, and many suppose that this law was not promulgated until after the return from the Babylonian captivity, at a time when the kingship had for the time disappeared and all the high powers were vested in the high priest.

The ancient rights of the avenger of the blood were not entirely abrogated, and the manslayer in the city of refuge had to take care to remain within its boundaries, for "if the manslayer shall at any time come without the border of the city of his refuge whither he was fled, and the avenger of the blood find him without the borders of the city of his refuge, and the avenger of the blood kill the slayer, he shall not be guilty

of blood." The avenger was not punishable for this act and the refugee was himself responsible for his death, because he should have remained in the city of his refuge until the death of the high priest, "but after the death of the high priest the manslayer shall return to the land of his possession."

Having concluded the law concerning the city of refuge, the code proceeds to the statement of the law closely connected with it, and there follow three important regulations changing the old law in most vital particulars. Before the establishment of courts of general jurisdiction in Palestine and the adoption of rules of procedure, various customs prevailed in different portions of the land. As regards the evidence upon which a murderer was condemned, one witness and circumstantial facts were sufficient to convict. Even the trial by casting lots was in vogue. The rule entitling the prisoner to the benefit of the presumption of innocence was unknown. And furthermore, having been proven guilty, the murderer could compromise with the kinfolk of the dead man by paying blood money and thus ransom himself. All this was changed by the Mosaic Codes. Our statute speaks thus:

"And these things shall be for you a statute of judgment throughout your generations in all your dwellings:—Whoso killeth any person the murderer shall be put to death by the mouth of witnesses: but one witness shall not testify against a person to cause him to die.

"Moreover ye shall take no redemption money for the life of a murderer which is guilty of death: but he shall surely be put to death.

"And ye shall take no redemption money for him that is fled to his city of refuge, that he should come again to dwell in the land until the death of the high priest."

The last provision was evidently intended to prevent trouble between the avenger of the blood and the slayer. The former on seeing the latter might be enraged and kill him

even though a compromise by payment of blood money had been effected. The law advanced step by step and did not attempt to correct abuses all at once. The notion of the sacredness of life and the abolition of the right of the avenger of the blood required centuries for its complete adoption by the people. It was only after the legislative prohibitions and moral suasion of many ages had done their work that the old ideas of the wandering nomads were finally stamped out. And indeed a consideration of the records of the criminal courts of our own time will convince the student that the old love of the primitive man for fresh blood has not yet entirely disappeared. The Mosaic statute concludes with the words :

“So ye shall not pollute the land wherein ye are ; for blood, it defileth the land ; and the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it.” This is an idea old beyond the memory and the records of mankind, that blood requires blood to be shed for it ; but the biblical law gives it a turn that attaches a moral reason to it. “Defile not the land therefore which ye inhabit, wherein I dwell for I the Lord dwell among the children of Israel.” Thus far the text of the

law in the 35th chapter of the book of Numbers. The other texts above alluded to supplement this text in some important particulars. The roads to the cities of refuge were carefully made so that the slayer could reach the city swiftly and without hindrance. (Deut. 19 : 3.) And when he reached the city of refuge he had to appear before its elders at the city gate, the usual place of assembly, and state his case to them, whereupon they took him into the city and gave him a place there to dwell among them. This formality required the slayer to make out a *prima facie* case of innocence, and thus enable the elders to receive him formally and place him under the protection of the city of refuge. (Josh. 20 : 4.) If, afterwards, the elders of the manslayer's city sent for him he had to be given up to them to stand trial for the crime. (Deut. 19 : 12.) Thus the ancient Mosaic Codes sought to impress upon the primitive Hebrew communities the doctrine of the right of man to life and liberty, a doctrine which has become commonplace in our days, but which in those days required not merely the wisdom of the lawgiver to make it fruitful, but also the sanction of the divine voice, and the fear of divine wrath.



BRAHMAN OFFICIALS.

BY ANDREW T. SIBBALD.

THE Madras Province is a country of considerable extent, inhabited by some thirty and odd millions of people. Of these, rather more than one million are Brahmans, who appear to be descendants of *Arya* refugees from North India, who immigrated into South India many centuries back, and the rest belong to hundreds of savage tribes, castes, and families whose origin is as yet unknown, and whose common characteristic is absolute inability to coalesce and form a body resembling a nation. Between the Brahmans and the people proper there is next to no intercourse; and it may be said without exaggeration that for practical purposes the Brahmans are strangers in the land as fully as are the English who sojourn there. They live apart in their own villages; they will not intermarry with, or drink water offered by, an ordinary Indian; and their undisguised contempt for the blacks who are not Brahmans largely exceeds the average Englishman's contempt for "niggers." The Brahmans have been longer than the English in South India, and unlike them have contrived to make themselves at home there. But strangers they are, and strangers they will ever be, in the midst of an alien, despised, and wholly unsympathetic population.

The Indians of Madras have no laws written or unwritten; but each tribe, each caste, each family has a few superstitious observances of its own, which serve to mark it off from other bodies and maintain its segregation; whilst the ordinary affairs of life are regulated by the very vague and shadowy thing known as "*custom*," the knowledge of which is believed to reside in the hearts of chiefs, priests, and elders. Any act or course of conduct declared to be opposed to this "*custom*" is believed by all Indians to be necessarily improper and culpable; whilst

any act or course of conduct that accords with custom, they hold to be proper and laudable.

In order to correct this rude and primitive folk, to stimulate its consciousness, and to enlarge its understanding, the Legislature has enacted the Indian Penal Code, a law which punishes offences with great severity, and is so minutely comprehensive in its terms that one or other of its provisions may be used against a man for almost any conceivable act or forbearance of a doubtful complexion. Thus a thief who has once before been convicted of theft may be transported for life; adultery makes a man liable to five years' vigorous imprisonment; and defamation of the most trivial character may lead to very serious penal consequences. Landowners often are imprisoned for innocently asserting their right to plough a field.

Manifestly a law of this kind would be a dangerous machine if worked by a clever, capable, and conscientious stipendiary magistrate in New York, under the eye of watchful newspaper reporters. What must it not be in the Madras Province, where it is worked in private by ignorant Brahmans, who for the most part have not realized in the very slightest degree the idea of moral responsibility?

The following is the mode in which the criminal law is administered there. The province is divided into some twenty districts. Each district comprises some six, seven, or eight thousand or more square miles, and has its own courts for the determination of all causes, whether civil or criminal, that may arise within their limits. Chief among them is the district and sessions court, presided over by a European judge, clothed with unlimited civil and criminal jurisdiction, both original and appellate, a sort of supreme court of judicature for the district. Next in grade

comes the court of the European magistrate of the district, who, besides being the collector of revenues and agent of the English government in all departments of affairs, is solely responsible for the right administration of criminal justice by the magistracy, and in effect rules the district. This officer is assisted by three or four European magistrates, and perhaps thirty or more native magistrates; and it is these native magistrates, who, assisted by the police, do nearly the whole of the criminal work of the province, partly as conductors of preliminary investigation in serious cases, partly as judges of law and fact in ordinary cases.

In doing this work the native magistrates guide themselves as well as they can by the Code of Criminal Procedure, a bulky work of nearly 550 sections, which follows in its main provisions the English practice, and presupposes in the reader at the least an elementary knowledge of English criminal law and practice in all their branches. Armed with such knowledge, an educated Englishman may hope to come to understand this Code sufficiently well for ordinary purposes after a few years' practice in applying its provisions; to the beginner, particularly if a native, it presents pitfalls and stumbling-blocks at nearly every step.

When in doubt about a matter of evidence, the native magistrate is supposed to turn for help to the Evidence Act of 1872, a speculative, *quasi*-scientific treatise, of which the introductory and controlling sections are written in language of preternatural difficulty, whilst the working sections, like those of the Criminal Procedure Code, presupposes in the reader the possession of a not inconsiderable share of knowledge of English law and practice. The native magistrate, as I have said, is supposed to turn to this act for help; whether he in fact does study its provisions may well be doubted. It is extremely probable that he has neither leisure, nor inclination, nor ability to profit by the instruction

that it may be calculated to afford to the patient inquirer.

Criminal investigations and trials are conducted in Madras very rarely in commodious court-houses, the construction of which is, by reason of the poverty of the country, absolutely impossible; generally in shabby little holes and corners, such as the inner verandas of native houses. Theoretically the public has free access to every court. But for divers good reasons the public does not largely avail itself of this, its privilege, and practically prisoners are examined and tried in the presence of the magistrate and half a dozen of his clerks and attendants. Theoretically, again, every person accused of an offence is entitled as of right to be defended by his counsel or other legal practitioner. But magistrates, as a class, object most strongly to pleaders appearing before them; and criminal proceedings usually are conducted in so abnormal and dilatory a fashion that but few legal practitioners of any standing and repute care to practice regularly before magistrates, and but few men who are so unfortunate as to be accused of an offence can afford to secure the services of a competent advocate. For, everywhere, in innumerable instances, a preliminary inquiry before a magistrate into an offence of the most ordinary kind extends itself over a space of three or four months, or even more; and since the majority of magistrates are ambulatory, being revenue and executive as well as magisterial officers, prisoners are marched about the country from village to village, some times hundreds of miles, before their doom is decided. In such circumstances it would be indeed surprising if prisoners generally could obtain the legal advice they so urgently need when they fall into the clutches of the police. The prisoner has no choice in the matter, and cannot help being detained in custody for months, and being interviewed by the magistrate two or three times a week in various parts of his district; but legal practitioners cannot be

compelled to undergo this kind of inconvenience, and undergo it they will not. Ordinarily, therefore, the only assistance a prisoner can obtain is that of some rascal who has no knowledge of law, no character, no courage to withstand injustice or irregular conduct on the part of the magistrate. In other words, as there is no publicity in most criminal inquiries and trials, so also there is no legal assistance on which an accused person can rely.

The native magistrates are almost all of them Brahmans, and, as I have said above, ignorant Brahmans, who for the most part have not realized in the very slightest degree the idea of moral responsibility. That they are and must be utterly ignorant of the ways of the world, and of the manners and customs of their despised fellow-countrymen, follows as of course from their bringing up and mode of life. Born a pauper in a mud hut in some *Agrahâra*, or Brahman quarter the official *in posse* is taught from his earliest infancy that he is a Brahman, and as such superior to the Gods themselves, whilst the wretched traders, farmers, and artisans of whom he occasionally catches sight are barely worthy to perform menial offices for his benefit. At a neighboring government or mission school he is taught by Brahmans, and his Brahman schoolfellows, and his prejudices grow apace. After picking up, at a cost of fifty or seventy-five cents a month, obtained not infrequently by begging in the streets, some mathematics and a smattering of English, which he contemptuously calls the "belly language," because to know a few words of it often enables a pauper to feed himself, the esurient lad of eighteen or nineteen begins to exert himself to get employment in a government office; and with the help of his relatives, connections, and friends, who probably fill every subordinate post in the district, he generally succeeds within the space of a few months in getting some petty clerkship of the value of five or eight dollars a month, which will enable him comfortably to support his wife and

children — these Brahmans all marry as children — and to prepare himself for the examinations that must be passed by all aspirants to posts carrying with them salaries of more than ten dollars a month. Occupied for many hours a day in copying and drafting correspondence and keeping accounts, and devoting his spare time to "cramming" for his examinations, the young Brahman official gets through a few years of very repulsive drudgery, and at last if he has played his cards tolerably well, he suddenly finds himself invested with the power of a magistrate, to be exercised in some lonely village far from the eyes of Europeans, and whither no reporter has ever yet gone. If he was puffed up with pride as a child, and if he was swelled out with self-conceit as a youth, what will he not be when he takes his seat on the bench, possessed of really tremendous powers, including that of issuing a warrant for the apprehension of a rajah, or even of a European gentleman, and with the consciousness that within a few years' time he may amass a fortune? Such a one should be indeed vain and ignorant; and since his course at school carefully excluded all religious and moral instruction, and his parents never taught him anything but to hold up his head as a Brahman, he must be utterly devoid of religion and morality, a man steadied by no moral ballast. Moreover, he can know no patriotism, because he belongs to no nation, and ignores as mere barbarians the Indians in whose midst he dwells and by whose labors he grows fat.

Such is the average Brahman magistrate. Of course there are numerous exceptions to the rule. Some native magistrates are the sons of well-to-do parents. Some, no doubt, have studied the teachings of Brahmanism, and are thoroughly orthodox and moral according to their lights; and a few, a very few, may have faintly endeavored by reading English books and newspapers to get some knowledge of the great world beyond the limits of their native villages. But what specially marks the character of the ordinary

Brahman official is ignorance, an ignorance of everything that goes on in the world, of the doings and sayings and thoughts of men other than Brahmans; of the modes in which people are governed, clothed, and fed; of the natures and uses of the various products of the earth; in short, of everything that is not to be seen in a Brahman village. Owing partly to his contempt for every person and thing not Brahman, and partly to his lazy and sedentary habits, the ordinary Brahman official learns nothing after he leaves school but the routine of his particular office and the niceties of native intrigue. So much for the native magistracy. The native judges, called District Munsifs, who do the great bulk of the civil and judicial work of the country, closely resemble the native magistrates in respect to education, general information, and morality, but must be allowed to be somewhat superior to them as regards law and procedure. They are required to pass more difficult examinations, and, as a rule, they have seen something of the practice of courts before being appointed judges. They do judicial work alone, sitting daily in more or less convenient court-houses, and they are assisted by regularly appointed pleaders, who are presumed to have qualified themselves for advocacy by passing an elementary examination in English and Indian law. If these functionaries were entrusted with the duty of receiving, hearing, and determining only the very simplest suits, and were directed to decide matters according to their own ideas of what is right and proper rather than according to the rules of a highly refined and complex procedure, it is possible that they might do fairly well. But, unfortunately, they are vested with a very large jurisdiction, and are called upon from time to time to settle disputes of the most complicated character, and their decisions must be grounded, in every case on supposed principles of the English, Hindoo, or Mahomedan law, or the *lex loci*, according to the religion and status or custom of the parties and the nature of the subject-

matter of dispute; and in any case they must guide themselves as to the whole conduct of the suit or proceeding by the provisions of the Code of Civil Procedure.

Besides the Code of Civil Procedure the Indian Legislature has made many laws intended to simplify matters that never can be made simple. I have already mentioned the Evidence Act. Then there are the Contract, Succession, Specific Performance, Limitation, and many other acts, all quite beyond the comprehension of ordinary unskilled persons, but which nevertheless are supposed to be studied and turned to proper use by the native judge and his uneducated bar. Happily, however, with the exception of the Limitation law, which is constantly undergoing alterations and repairs, these acts are quietly "shelved" by most of the courts, as supplying no need and being unnecessary for the conduct of business; and by this simple process no doubt an immense amount of trouble and of damage to rude litigants is avoided.

One would expect that the difficulty necessarily felt by native judges and pleaders in dealing with purely English enactments would vanish when they come to the settlement of questions of Indian law and custom. But this is far from being the case. Under the existing system of administering justice the Brahman judge is actually precluded from ascertaining by patient investigation the existing customary law of the persons who contend before him, and in lieu thereof is obliged to administer what are inanely styled "The Mahomedan Law" and "The Hindoo Law." The former of these is the supposed law of the orthodox believers of Bokhara and Bagdad, and perhaps as well suited to the wants of the professing Mahomedans of Madras as the written laws of Greece to the inhabitants of New York. The latter, being buried in a highly artificial language that never could have been used for the purposes of ordinary conversation, is even less adapted to the wants of the savage tribes, castes, and families of South India. And, in effect,

what is now administered as "Hindoo Law" to the various tribes and castes constituting the population of the Madras Province, most if not all of whom are not "Hindoo" is an aggregate of discrepant and inconsistent guesses, made by unsympathetic persons wholly ignorant of Sanskrit, at the meaning of generally imperfect and sometimes questionable translations of mutilated Sanskrit

texts, themselves of doubtful authenticity, taken at random from purely speculative and religious treatises on what ought to be the rule of conduct for an ideal Arya community.

This description of the Sanskrit law at present administered in the Indian courts to the (so-called) Hindoos of Madras is not overcolored as may be proved by an overwhelming mass of evidence.

ORIGIN AND GROWTH OF RIGHTS OF ACCUSED.

BY E. RAY STEVENS, OF THE WISCONSIN BAR.

IN the year 1670 in the prisoner's dock in the old Lord Mayor's Court of London were two persons who, by keeping their heads covered in the presence of court, as well as by other peculiarities of dress and manner, proclaimed themselves Quakers. They were charged with preaching to a concourse of people in Greenchapel Street to the terror of the people and against the peace and dignity of the commonwealth. No counsel represented them, no witnesses had been called in their behalf, the only right accorded them was that of telling their own story to the jury. It appeared that their church had been closed by the officers of the Puritan government and that they had talked to the people in the street for want of other meeting place.

Eight of the jurymen have just returned to the court room to announce that the other four will not agree with them. The offending four are brought in and abused roundly by the court. One juror, Bushell, is singled out for special abuse; he is told that he is a disgrace to any jury, and he retorts: "I would not be on the jury if I had not been compelled to come." The jurors are sent out again, and finally come to announce that they find the defendants guilty of speaking in the street. Again Bushell and the rest are berated and sent back. Again they re-

turn with a verdict of guilty of preaching to an assembly. This is too much for the court. The verdict is greeted with:

"Gentlemen you shall not be dismissed till we have a verdict that the court will accept; and you will be locked up without meat, drink, fire or tobacco; you shall not think thus to abuse the court. We will have a verdict by the help of God, or you shall starve for it."

Upon this one of the Quakers, who is none other than William Penn, the founder of Pennsylvania, objects to this treatment of the jury. The only reply of the court is the command to the bailiff: "Stop that prating fellow's mouth, or put him out of court."

The jury do not return again until a night has passed, and then with the same verdict. Again the same abuse by the Lord Mayor, in which poor Bushell is threatened with having his nose slit if the defendants are not convicted. Again Penn's objections are met with the command: "Stop his mouth; jailor, bring fetters and stake him to the ground."

Despite their protests that they had given their verdict, the half famished jurors are sent out again, and finally on the next day return a point blank verdict of not guilty. The court is forced to accept the verdict, but fines the jury forty marks and commits the jurymen to prison until these fines are paid.

Penn and his fellow prisoners demand their liberty, but instead are found guilty of contempt of court because they have not uncovered their heads in the presence of the court and are committed to prison for punishment.

We are glad to know that both of the defendants and all of the jurymen are subsequently released by order of a higher court without paying fines or suffering long imprisonment.

This is the last recorded case in which the court attempts, by threats and intimidations, to force a jury to find such a verdict as the court desires. But prior to that time, the history of the courts is filled with instances in which the jury were coerced into a verdict by means of fines, imprisonment or the want of food or other physical comforts and necessities.

Another man prominent in the history of America, figured at an early date in one of the well known state trials, in the days when the defendants in such proceedings had few rights that any court felt bound to respect. Sir Walter Raleigh was charged with high treason, Coke was prosecuting officer, and the case claimed the attention of one of the highest courts of the realm. The evidence against the accused consisted almost entirely of the *ex parte* confession of one Cobham. Raleigh produced a letter from Cobham flatly contradicting the confession and asked that Cobham might be called as a witness to testify in open court. This request was refused.

The accused was without counsel; he was battling with one of the greatest lawyers of his time; he came from a close imprisonment that gave no opportunity to prepare his defense; he had no means of procuring witnesses, and no right to introduce evidence if he had procured the witnesses. Every indignity was heaped upon him. The following passage at arms will give some idea of the manner in which the trial was conducted:

Coke (addressing Raleigh). "Thou art the most vile traitor that ever lived."

Raleigh. "You speak indiscretely, barbarously and uncivilly."

Coke. "I want words sufficient to express thy viperous treason."

Raleigh. "I think you want words indeed, for you have spoken one thing half a dozen times."

Coke. "Thou are an odorous fellow. Thy name is hateful to all the realm of England for thy pride."

Raleigh. "It will go hard to prove a measuring cast between you and me, Mr. Attorney."

Coke. "I will make it appear that there never lived a viler viper upon the face of the earth than thou."

We are not surprised to know that Raleigh was convicted. A contemporary writer said: "To be accused of crime against the State, and to be convicted, are almost the same thing."

In tracing the slow process by which the rights of accused persons gained recognition, we find that, from earliest times, persons accused of crime against the public have been proscribed. In Athens and in Rome and among the Anglo-Saxons and the Normans, all participation in public affairs was denied the accused. In the primitive courts of our forefathers, where we first find the jury, the giving of evidence was a public function like the holding of office. Indeed, the accused could not have given evidence, because of the fact that the same persons gave the evidence and decided the cause.

Those first jurors were chosen because they had knowledge of the facts in controversy. With the slow evolution of the courts, the jurors became triers of fact alone, while witnesses were called to give the evidence. With this change in the organization of the courts and in the method of trying causes, the reason for the rule rendering the accused incompetent had been removed, but this old rule was tenaciously adhered to for centuries. In fact, we have but recently arrived at the stage where the old, arbitrary

rule absolutely excluding certain classes of witnesses have been replaced by the more sensible ones excluding certain kinds of testimony.

It is interesting to note that our distinction between the record and the bill of exceptions comes down to us from the time of those early jurors, who combined in themselves the double function of jurors and witnesses. When the jurors themselves knew the facts in the controversy, there was no need of testimony. A complete record of the proceedings in court was made up of what we now call the pleadings, together with the verdict of this jury and the judgment. When the courts began to take testimony, this testimony was no part of the record as established in these ancient courts, and could only be made such by some procedure similar to the modern one of settling a bill of exceptions.

It will be noted that before the modern jury had its beginnings, in the time when mooted questions were determined by compurgation, by the wager of battle or by the ordeal, the accused was not disqualified. This disqualification came only when the courts were so organized that the introduction of evidence, as distinguished from compurgation, becomes essential to the determination of disputed questions. We owe our peculiar system of legal rules, which is grouped under the designation of the law of evidence, to the jury system. Without the jury our law of evidence would probably be as undeveloped as it is in those continental European countries where the jury is called only in criminal cases.

These rules of evidence are not based on logic, but have been slowly evolved from judicial experience with untrained minds which must be tied down to the question at issue, so that all incompetent testimony may be excluded. The jury itself arose silently and gradually out of a state of society that has long since passed away. It does not owe its

origin to any positive law, but was established by a process of slow and gradual growth.

With the abolition of the ordeal in 1215, there was left but one method of determining the guilt or innocence of one accused of crime, that of trial by jury, which had its beginnings a half century earlier and more. Far from being a right guaranteed to the accused, this right to trial by jury was something to be purchased with gold or influence. It became very popular after the abolition of the right to establish one's innocence by compurgation about the middle of the twelfth century, as, after this time, it afforded the only means of escaping conviction under the ordeal. When the ordeal was abolished early in the thirteenth century, the trial by jury was the one method of trying accused persons that remained, and this one method could be employed only when the jury was demanded by the accused. No one was compelled to have a jury trial. Those accused of crime soon discovered that, if they did not demand a jury trial, they might escape punishment, as they were no longer compelled to go to the ordeal. Then follows the adoption of one of those interesting expedients, so often resorted to in the course of legal history, by which the result desired is accomplished without attempting to remove the cause of the trouble. The courts met the emergency by committing the defendant to prison, where he was stretched upon the floor, with heavy stones piled upon his breast, while he was regaled with stale bread, bilge water and other similar delicacies until he demanded a jury trial. Thus did the old judges administer justice, at the same time keeping sacred the right of the accused to have a jury trial only when he demanded it.

This practice was not abolished in England until about the time of the Declaration of Independence. It was frequently called into use on this side of the Atlantic. Dur-

ing the witchcraft troubles in Massachusetts, one man died under this treatment rather than demand a jury.

Even after the jury had become the established means of trying causes, the procedure in the courts had few points in common with the jury trial of to-day. It consisted largely of an argument between counsel for the prosecution and the prisoner; the latter, usually untrained in the ways of courts and lawyers and at the mercy of counsel, time-serving judge and subservient jury, was at a decided disadvantage in the contest. Each point was argued as it arose, the course of the testimony depending largely upon the admissions and denials of the accused. The testimony for the prosecution was given almost entirely by means of *ex parte* confessions taken without the consent or knowledge of the accused. When the testimony was closed the judge summed up the case, and, with the verdict of the jury, the trial was over.

As the verdict of the jury was considered the expression of the all-wise Creator as to the guilt or innocence of the accused, there was no provision for an appeal. But sooner or later the old jurists seemed to have lost faith in the divine inspiration of juries, for we find creeping into the judicial system a provision for the trial or attainder of any jury that had apparently failed to render a just verdict. The forerunner of our court of appeals is this jury of twenty-four men called to try the twelve who had rendered a false verdict. This attainder of the trial jury was long in use both in England and in this country, in Georgia, for example, even to the time of the American Revolution.

The early barbaric trial was based on the idea of divine intercession on behalf of the innocent who happened to be accused of crime. If a man be innocent, fire would not burn nor boiling water scald his flesh—such was the belief of the early judicial mind. When these old modes of trial had been left behind, and something that foretold

of the modern trial had come in their place, this old idea that some invisible power would protect the innocent still prevailed. While the prosecution had counsel to conduct and witnesses to establish its case, the accused was left without the aid of counsel, for, to quote the reasoning of the time, "If innocent, he need not have counsel, if guilty, he ought not." It was argued that the accused did not need witnesses or the means of procuring evidence in his own behalf, for, "In order to convict, the proof must be so plain that no one would contend against it."

To understand the attitude of those who argued in this way, we must remember that the jury came simply to replace the ordeal. Like the ordeal, the jury was considered a method of appealing to Deity, who, being all-powerful, would certainly protect the innocent. If the Creator watched over the rights of the accused, it seemed to these men of olden time that it would be vain indeed to procure counsel and witnesses for him.

The scandals connected with the administration of the criminal law had become so marked that, with the coming of the Puritan Revolution, radical changes were made in criminal procedure. Chief among these was the right of calling witnesses on behalf of the accused and the right to cross-examine witnesses called by the prosecution. But the accused was still at great disadvantage. He was not allowed the assistance of counsel; there was little protection against perjury on the part of opposing witnesses; he was confined in prison up to the time of the trial and had little or no opportunity to secure his witnesses or prepare his defense.

As a matter of clemency toward the accused, he and his witnesses were not sworn because it was said that, if they were not bound by an oath, they would "speak more largely and beneficially for the accused." The jury, however, were cautioned not to give too much weight to testimony not taken under oath. Much evidence was introduced

that was not relevant to the issue. As yet, the courts had not learned to exclude incompetent testimony. The witnesses made long speeches, and altogether these old trials remind one much of the recent Dreyfus trial in France.

In course of time, counsel was admitted to assist accused persons in their defense and to examine the witnesses for them. But as yet the accused alone was given the right of addressing the jury. For said an old judge: "No one knows his deeds as well as the accused himself." These rights were but slowly extended. Even as late as 1760, we find that an accused person was compelled to conduct his own defense, examine and cross-examine the witnesses, where the issue tried was on his defense of insanity.

It was not until the last half of the century, just closing, that the rights of the accused, as we understand them, became recognized and established in England.

These rights did not come to the accused as the result of any positive legislative enactment, but came rather through the efforts of the courts in the administration of justice. The London Spectator speaking but little more than a decade ago, upon the occasion of the removal of the last of the restrictions upon the rights of the accused, said in regard to the ancient court procedure: "The law was reduced to a game of mixed chance and skill, presided over by justice, who was very properly represented as blind, as she had always to be taking leaps into a subjective darkness."

In passing judgment upon these early English courts and upon the slow development of the rights of the accused, we must not forget that these courts existed at the same time with the Inquisition: and that, unjust as may have been the method of procedure, it was far in advance of that of Continental Europe. Nor were these early courts, with their somewhat barbaric procedure wholly unsuited to the time in which they existed.

The people were not ready for our modern judicial procedure. Government was based upon force; and the courts formed no exception to the rule, that only those instrumentalities of government that showed that they had power and force behind them commanded the respect of the people.

The history of much that we have considered is the history of our own law before it was transplanted to American soil. It is of interest to note that the fear of courts and lawyers, that such proceedings as we have considered had engendered among the people of England, came to this country with the early Americans. Several of the American colonies passed acts denying lawyers the right to sit in their legislative assemblies, while others thought to scotch the lawyer, if not to kill him, by forbidding that any one take pay for giving advice or pleading for another in court.

In all American jurisdictions, we believe, the accused is given the right to testify in his own behalf. In most, if not all, of the states statutes have been passed declaratory of this right, but in many states these laws have been put upon the statute books within the memory of men still in active practice.

The history of the modification of the rules of evidence and procedure governing the rights of accused persons shows how profoundly such matters are influenced by the spirit of the time. In time of tyrannical kings the courts seem to be at a standstill as regards these matters, again at the time of the Puritan Revolution or at the time of the coming of William of Orange or in the years following the Declaration of Independence, the onward progress is marked. Most of the advances made, most of the rights secured, have come without positive legislative enactment, but rather by that slow and subtle process by which ideas of justice are transmuted into rules of law to protect the rights of man.

A GREAT GOLD ROBBERY.

I.

THE DISCOVERY.

IN November, 189-, the *Times* contained the following message, which had been received from the New York correspondent of that journal:—

"An extraordinary robbery of gold bullion has been discovered here. Yesterday Messrs. Raphael & Montagu, the well-known bullion brokers, received ten cases which had been consigned to them by their agents in London. When the cases were opened it was found that the gold had been removed from one of them and bars of lead substituted. The case appeared, even to the most minute scrutiny, to have been untampered with, and the seal of the Bank of England, at which institution the gold was purchased and packed, was unbroken. The cases arrived on board the Cunard liner "Gallia," and it is at present impossible to say at what point in the route the substitution was made. The loss is said to amount to about £7,000, and this will, of course, be met by the underwriters in London who insured the safe delivery of the valuable consignment."

The publication of this telegram in London caused no little uneasiness. At the time, gold was being shipped to New York nearly every day, and the precautions taken to prevent robbery were thought to be so stringent that gold was looked upon as the safest to insure of all cargoes. The underwriters rushed from thoughtless confidence into an equally thoughtless panic, and insurance rates were more than doubled. This hit the bullion brokers, who were very angry. The newspapers cast from one to another ill-instructed guesses as to how the robbery occurred, without adding to the sum of knowledge, and the interested public hungered for an authoritative statement of facts. After a week or two of silence, this statement came from the *Economist*, in the form of an admirable ar-

ticle, which gave all that has yet been made known concerning a most ingenious crime. No further losses were reported, and the city, which learns little and forgets everything, forgot the robbery as soon as the newspapers ceased to mention it. The *Economist* said:

"When we read of the recent remarkable gold robbery, two points struck us as being incomprehensible. According to the *Times*, lead was substituted for gold in one of Messrs. Raphael & Montagu's cases, and the seal of the Bank of England was unbroken. Now gold is, bulk for bulk, nearly twice as heavy as lead—the proportion being roughly nineteen to eleven; how, then, could the base metal be substituted for the precious one without the difference in weight being at once perceived? When we reflected further that cases of gold bullion in course of transport are carefully weighed by every railway and steamship company by which they are carried, and that the weights are compared with those given in the receipts which the companies sign, the matter became the more mysterious, and we grew near to believing that the excellent *Times* correspondent had somehow muddled the affair. In this we did him an injustice. He was as accurate as the telegram would permit. The fact that the bank's seal was unbroken was a severe difficulty to us, though not so great as that of the substitution of lead for gold. One hears of the successful imitation of seals, but it gives one an unpleasant shock to realize that even the seal of the bank of England is not sacred, that it can be imitated readily and perfectly, and that its imitation is of quite secondary difficulty where bullion thieves are concerned. We felt that our duty towards the business community of the great City of London compelled us to clear up the circumstances of this robbery to the best of our ability, and we accordingly telegraphed to a valuable correspondent in New York, directing him to supply us with the full-

est details. We have received our correspondent's report, and we may say at once that, much as we reprobate the robbery as an immoral violation of the sanctity of property, we cannot but admire the extraordinary cleverness of its perpetrators.

"To make ourselves clearly understood we must direct the attention of our readers towards some figures. The ten cases which were consigned to Messrs. Raphael & Montagu were provided and packed by the Bank of England, and were similar to those always used for transporting gold bars. Each case contained five bars, and each bar was six inches long, four inches broad and one and a half inch thick. The weight of each bar was 393 Troy ounces, and the value was about £1,400. The wood of the cases was two inches thick, so that when the top was put on, the outside dimensions of each case were: Length, ten inches; breadth, eight inches, and height eleven and a half inches. After the covers were fastened, strips of hoop iron were whipped around top and bottom and nailed down, and the bank's seal was impressed on wax in such a manner that the covers could not possibly be removed without the seals being broken. We may add that the ten cases were packed in the courtyard of the Bank of England in the presence of one of Messrs. Raphael & Montagu's London agents. They were then placed on a van belonging to the London & Northwestern Railway Company and carried at once to Euston Square. Little more than half an hour elapsed between the time when the van left the bank and the time when the Liverpool Express left Euston.

"The *Times* correspondent was practically right when he said that lead was substituted for gold but he made one apparently small but really vital omission. He did not say that an entire case; box as well its contents, was stolen, and a new one substituted in its place. By this simple but vastly ingenious means, the difference between the specific gravities of lead and gold was overcome. The thieves evidently were familiar with the size and the appearance of the Bank of England's bullion cases, and they provided themselves with a similar one for the purpose of their crime. They then carefully worked out the relative specific gravities of lead and gold, and discovered that bars

of lead seven and a half inches long, five and a half inches broad, and one and a half inch thick would weigh as nearly as possible the same as the bank's bars of gold which were six inches long, four inches broad and one and a half inch thick. The inside measurements of the substituted case were, at first, of course, the same as those of the bank's cases, but these were subsequently increased by simply cutting away the inside wood until the space was large enough to receive the leaden bars. By means of this device the outside measurements of the case were undisturbed, and the thickness of the wood at the corners where it could be seen remained at two inches. After the cutting had been completed, the sides of the case were still about one and a quarter inch thick, and were more than strong enough to support their heavy load. We do not know how the bank's seal was imitated, we only know the fact that it was. Our correspondent writes that the substituted case was absolutely correct in weight, in appearance and in seal, and that it could in no respect be distinguished from the nine genuine cases with which it travelled. He adds that inquiries have not resulted in the smallest evidence being discovered which might show where and how the substitution was made. The weight of the full case was considerable, as much as one hundred and twenty-five pounds avoirdupois, but one, or perhaps two men could carry it without any undue exertion. The gentlemen who fill our coal cellars handle much greater weights with apparent ease. The whole affair was so carefully planned that the substitution could have been made in a few minutes, and the discovery of the robbery at the last possible moment, upon which the thieves could calculate, makes it seem certain that they have long ago provided adequately for their safety. Against thieves of their intellectual caliber the guardians of society are helpless, and it is perhaps fortunate—though on this point we have our doubts—that such men usually exercise their genius in safer and even more profitable pursuits. In the City of London, for instance, with their ingenuity and disregard of moral scruples, they might have become distinguished financiers and been the darlings of a self-seeking society. Instead of which—"

And so the *Economist* concluded an excellent article.

II.

THE ROBBERY.

"Will he stop?" asked the tall unwholesome man called Stevens.

Wallis's reply was curtly offensive.

"Suppose you ask him?"

Stevens shivered. "Consider—consider my position and character."

"Oh, you respectable cur," said Wallis, "you want the cash for yourself and the risk for me. Well, you won't have either."

"Is it off, then?" Stevens's expression for an instant was one of relief; then the recollection of his liabilities fell on him and he groaned, "Is it off?"

"No, it is not. He will stop for five minutes."

"How—?"

"He has a wife and she is ill. It is a pretty job, more suited to you than to me."

"My character—" began Stevens.

"Man," said Wallis sternly, "I know you. Keep your character for the directors of the South Eastern Bank. I have none, and cannot afford the luxury of heartlessness. Understand that you are my tool, my paid tool, whose business is to obey orders. Without you I could not raise the money which will be required. That is the end of your usefulness. For that service you will receive £2,000; the rest will be mine."

The respected cashier in the South Eastern Bank jumped up, walked to the door, returned, and sat down. Wallis laughed.

"Williams, the North Western man, will be driving a van load of gold cases from the bank to Euston one afternoon this week. He will let me know the day and hour by telegram, when he knows them himself. He expects to get away from the bank about half-past three, and as the Liverpool train leaves Euston at 4:10, he cannot give us

more than five minutes. He will drive along Gray's Inn Road, turn down Wells Street, and stop here."

"Here!" screamed Stevens, "at my lodgings!"

"Here. If you don't like it, you can retire from the affair."

"Wallis, let me implore you—"

"Don't be a fool. Do not hundreds of railway vans stop at private houses every day, and what is there especially noticeable about a van carrying gold? The fact is not placarded on it. An ordinary railway van stops here, certain things happen, and five minutes later it is driven away. If fifty people saw it, they would see nothing unusual. The boldest course is always the safest, because the least suspected."

"I do not trust you. You want the danger to fall on me."

Wallis shrugged his shoulders. "I do not want the danger to fall on anybody. You need not go on unless you like."

"I wish to God—"

"Better leave God out. It seems unsuitable. Your moral scruples are only cowardice in a wrapping of religious phrases."

"If the robbery is discovered at Euston we are caught at once."

"The robbery will be discovered in New York."

"You cannot make sure."

"Absolutely sure. I was not clerk in the bullion office of the Bank of England without learning a few useful things. I was a smart clerk."

"Yet you were sacked," said Stevens, coarsely.

"Precisely. I was sacked for borrowing a few pounds from a money-lender—for exactly the same thing which you are going to do on a larger scale this afternoon."

"I wish that could be avoided. I should lose my place if it were found out."

"Will your place be more secure when you are made bankrupt, as you will be in a few weeks if we don't get this gold?"

"I am hemmed in on all sides," groaned Stevens, "oh, why—?"

"You will want £100. I have promised Williams £50, and I have also promised that no suspicion shall ever approach him. I have not your unblemished character, but I am a man of my word."

"You did! Why I thought—"

"Yes. You thought that all risk was to be shunted on to Williams. That is just the kind of thought which would come naturally to you."

"How will you prevent it?"

"That is my business. You will kindly now go to Graham, the money-lender in Essex Street. He will let a respectable bank cashier like you have £100 without any trouble, and he won't charge you more than sixty per cent. When you have the money, I may perhaps give you a few more details. You may not trust me, but you cannot rise to the supreme mistrust which I have for you. Now go."

It was twenty minutes to four on Friday afternoon. Stevens stood at the window of his own sitting room looking into Wells Street. He was instructed to give instant warning of the approach of the railway van. As a watchman he was indifferent, lacking concentration. Wallis moved about his preparations, quiet, determined, a man who knew that haste eats up valuable seconds. On the floor stood a small open case filled with large, flat leaden bars. The protecting bands of hoop iron had been bent back and the cover taken off. The writer in the *Economist* has already described both case and contents in ample detail. Wallis was the designer and constructor. Near the case was a large spring balance. On the table, conveniently arranged, were plaster of paris, water, a large bowl, putty, linseed oil, sealing-wax, a hammer and nails, a chisel, a knife, and a watch. A small gas-cooking stove supplied by a long flexible tube had been placed on the table; it was

burning. Wallis looked round, thinking hard. "All is ready," he said.

A strange cry came from the window.

Instantly Wallis picked up a great coarse sack, and looked around again, "Stand by the balance," he said sharply.

There was a rattle of wheels outside, and Wallis was gone. The seconds ticked away, ten, twenty, thirty, and he came heavily back with the great sack slung over his shoulder. In a moment a second case stood by the first; closed, nailed down, and on the edge of the cover the Bank of England's broad, red seal! Stevens staggered back shivering, the awful reality of what had been done, striking him like a blow. Wallis stooped and with a powerful effort swung the stolen case to the tray of the balance. "Read the weight," he cried, "and make no mistake." He dragged his own cleverly designed case near and temporarily adjusted the cover.

"A hundred and twenty-nine and a quarter," murmured Stevens.

"Off it comes. Now read again." He heaved up the load of lead.

"A hundred and thirty and a half." Wallis snatched at the chisel and cut long curls from the uppermost bar. "Now!"

"A hundred and twenty-nine." Wallis threw back into the case a small piece of lead, then another. "Make it about an ounce less than the gold," he said. "We must allow for the nails and the wax."

A moment later came the quick beat of the hammer, as Wallis drove the long nails through the cover and fastened down the bands of hoop iron.

The watch on the table ticked on, two and a half minutes had passed.

Now came the most delicate and difficult part of the scheme which had been so exhaustively planned. The false case resembled the true one in every respect except that it had no seal, and without this was useless.

"Mix the plaster of paris," said Wallis, "and stir it quickly lest it set too soon."

He took the putty and built a low wall about the Bank of England's seal. Then he lightly oiled both wax and putty. The plaster of paris was ready. Wallis filled the shallow well he had made, watched the plaster for a few seconds while it set, then lifted off the hard, white block. The oil had prevented any sticking, and Wallis had secured an exact impression in reverse of the bank's seal. Stevens, who had been drilled into the understanding of details, melted sealing-wax in a ladle over the gas stove. "Steady," murmured Wallis, "we have nearly finished." The wax was poured into its appointed place. Down came the false seal, impressing its lie in characters as clear as those of truth, and the work was done.

Once more the sack was raised on Wallis's shoulder, but this time it went out full and returned empty. The wheels of the railway van rattled on until they met the deeper roll of the Gray's Inn Road and were lost. On the floor of the quiet room lay an insignificant looking case, its treasure still hidden, and over it stooped two white-faced men.

"It was well done," murmured Wallis; "there were three seconds to spare."

III.

THE GOLD.

The same room and the same men. Three days had passed, days which had cut strange lines in Wallis's boyish face. He had made a mistake; a thing always unpleasant in itself, hateful when involving confession to a man like Stevens. In a corner of the room stood a new safe bought for the purpose, and in it lay the unopened case of gold. Wallis had left the treasure in Stevens's hands without hesitation. "You would steal it all if you dared," he had said unkindly, "but you do not dare. You know that I should at once lay an information against you, and you

would be caught with the stuff in your possession. You couldn't get rid of it."

"By the way, Stevens," he said now, "have you thought of the means by which we are to realize our spoil? That is a problem of some interest."

"I suppose there are ways," answered Stevens, crossly; "but I don't know them. You have had the management of this business and you had better keep it."

"I also suppose there are ways, but I don't know them. It seems rather absurd."

Stevens sprang to his feet. "You don't know! Have you blundered into this, you swaggering fool, that you can't sell the gold you've stolen? Why didn't you consult me?"

"That's precisely what I'm doing now."

Stevens dropped into his chair. "It must be possible," he said, weakly.

"Listen to me."

"I want my £2,000."

"Listen to me, and as soon as I have finished you shall have your £2,000!"

"I shall really have it?"

"You shall really have it," said Wallis, smiling grimly. It was a nasty smile.

"When I was at the Bank of England," he went on, "I learned a good deal about gold, but there was one detail which escaped me. We are now breaking our heads against that detail. You well know that by the Coinage Act of 1870 any one is entitled to take gold of the mint and have it coined at the rate of 77 s. 10 1-2 d. an ounce. There is nothing to pay. This seemed to me to be an admirable arrangement, and when I planned this robbery I had in mind to take the gold to the mint in small quantities and gradually to have it coined. I always believe in the bold course, and this seemed both bold and safe."

"That is all right. What is the difficulty?"

"You shall hear. Yesterday I thought it well to study the subject more fully, so as to find out all the ways of the mint and to guard myself against unexpected dangers.

I went to the Guildhall Library and looked up a book on the subject. I found everything satisfactory except for one detail, and that detail, Stevens, is the devil. I found that although the Bank of England pays only 77*s.* 6*d.* an ounce for gold—1 1-2 *d.* per ounce less than the mint—yet in practice it is better to sell gold to the bank for cash than to wait an indefinite time for the mint to turn it into coin. It has, therefore, happened that since the passing of the Coinage Act one firm, only one firm, has ever sent gold to the mint to be coined. Only one!”

“I remember now,” said Stevens, “I remember reading about it years ago.”

“This makes it impossible for us to send our gold to the mint. We should be curiosities who would attract universal attention, and I may say, Stevens, that public attention is not exactly what we desire. As members of a crowd we could have passed unsuspected, but as the claimants of a right which has lapsed in practice we should be the objects of most embarrassing scrutiny. The half-penny evening papers would even want to ‘interview’ us.”

“What do you suggest?”

“I confess that I don’t see my way. It seems absurd to possess £7,000 in solid gold and to be in difficulties for a five-pound note, but that is just my position. Your position is even worse. I have thought right through the problem and I am out on the far side. Gold is usually handled by bullion brokers, who are members of well-known and wealthy firms. Private persons never possess unmanufactured bullion in any quantity unless they steal it, and having stolen it they instinctively shrink from giving references.”

“You mean that if we tried to sell to a bullion broker, we should be asked for references.”

“Of course.”

“Why, in God’s name, didn’t you think of this before?”

“Because I was blinded by my faith in the mint.”

Stevens began to pace the room. It was November and cold, but the sweat stood out on his face. “Why not take your courage in both hands and sell to the bank?” They only give 77*s.* and 9*d.*, but it is better to sacrifice 1 1-2 *d.* an ounce than to—”

Wallis roared with laughter. “I would love to do it, if only for the humor of the thing, but it would be impossible. They would want to know where I got the stuff, and it would take a very strong lie to carry a hundredweight of their own bars.”

“What are pawnbrokers for?”

“To borrow money from.”

“Well, couldn’t we?”

“I have thought of that, but there are difficulties. We should have to find a venal pawnbroker. No one else would look at unmanufactured gold, for it would certainly be stolen property. Now, pawnbrokers are licensed, and overlooked by the police, and their interests generally keep step with their honesty. No doubt there are venal pawnbrokers, but I can’t risk my liberty for the next twenty years by experimenting in searching for one.”

“I am afraid,” said Stevens gravely, “that we shall be obliged to sacrifice a good deal of the value of the gold by selling to a receiver. I believe such people are called ‘fences.’ Of course I won’t in that case insist on the whole of my £2,000. I will be content with my share of what the lot sells for.”

“All right,” said Wallis, “you shall have your share and shall sell it to a ‘fence,’ as you call it. I don’t know any ‘fences’ myself, but no doubt you are more fortunate.”

Stevens cursed loudly. “I won’t be made a fool of any longer. I believe you can easily sell the gold if you like. You promised me my £2,000 just now; give me my money and clear out. I shall never want to see you again.”

Wallis smiled. "I will. Open the safe."

Stevens took the key and opened the safe, wondering.

Wallis dragged out the case of gold, and with the help of a chisel and hammer stripped off the cover. Then he took out a couple of the bars and began with grave deliberation to cut one of them in half. Stevens looked on uneasily. The work was not easy, for the bar was one and a half inches thick, and gold, though soft, is troublesome to cut. At length Wallis got through, and taking one complete bar and one of the pieces, placed them on the spring balance. "It's rather too much," he said, smiling to himself at the thought of a man weighing gold and not regarding accuracy within a pound or two avoirdupois. He lifted what he had weighed from the scale pan to the table before Stevens. "There is your £2,000," he said sternly, "and about £100 over."

Stevens shrieked out useless oaths. "I won't take it."

"All right," said Wallis, "please yourself. The payment is good even for a legal debt, since gold bullion is a universal and international currency. You are now temporarily rich; £2,100 is a handsome sum." While Stevens hurled threats and prayers indifferently at his head, Wallis put the remainder of the gold into two strong hand-bags, and prepared to leave.

"By the by," he said, "if Graham becomes troublesome, give him a nugget on account, it will please him. Your latest dancing girl would love a lump, and you might dispose of the surplus to a 'fence.' Good-bye."

Wallis was gone, and Stevens sat trembling at the table, with five hundred and fifty useless ounces of solid gold mocking his wretchedness.

Wallis walked down Gray's Inn Road, carrying a bag, loaded with over forty pounds weight, in each hand. He was strong, but the weight was terrible, and the

infinite weariness of the burden oppressed him. He was not troubled by the simple fact of his crime; but the futility of it, the pressing danger of discovery with the gold in his possession, the waste of thought and skill—these things stabbed him into anger. He went down Snow Hill into Farrington Street, and so to Blackfriars Bridge. The gold grew heavier as he walked, and no relief was possible by an interchange of loads. The treasure, which any one among the passing crowd would have killed him to possess, was nothing but a burden and a danger. He stopped in the middle of Blackfriars Bridge and rested the bags for a moment on the parapet, thinking.

Wallis was in many respects a practical genius. He had no imagination to disturb the soundness of his judgment, and his execution when a plan had been formed was prompt and perfect. He had designed and executed the cleverest and most successful gold robbery that records tell of. He had failed where he was certain to fail, and now in failure his judgment, which had been disturbed by the false glimmer of success, came back to him.

With a quick deliberate movement, he pushed both bags off the parapet into the river.

A policeman approached, proudly indignant. "Young man, the public has no business to throw things into the river."

"No!" answered Wallis lightly, "there are many things which we have no business to do."

"You are about no good."

"On the contrary, I never did a better deed in my life."

Wallis walked with the policeman to the station. He knew the intolerable weight of those bags, and knew that the gold would at least secure the useful purpose of keeping them at the bottom of the river. He was detained for twenty-four hours, and released with a warning. The sententious solemnity of the police amused him. He went away,

wearied of profitless crime, reverted to honesty, and prospered according to the measure of his intelligence.

How the respectable Stevens concealed his treasure I do not know. When his unpaid money-lender and his numberless other clamoring creditors swept up the relics of his property, they found no gold and no

case with the Bank of England's broken seal. The man was bankrupt and broken in spirit. He was discharged from the South Eastern Bank, and may occasionally be seen, on his lucky days, carrying sandwich boards in the Strand.

BENNET COPPLESTONE.

Cornhill Magazine.

CURIOSITIES OF RENT.

THERE is perhaps nothing very attractive to the general reader in the mention of "Rent;" but when we come to consider the quaint forms which it has often adopted, the subject will not be found wholly devoid of romantic interest. In days gone by, when kings had perforce to maintain a large crowd of retainers, and nobles vied with each other in the numbers of their retinue, it was not always easy to find the wherewithal with which to carry on the provisioning of such large households; and so landlords, royal and otherwise, were often glad to accept useful commodities, such as the herrings of Yarmouth or thirteen hundred eggs with one hundred and forty hens from Banbury, in place of the usual military service due to them for different estates. In other instances the tenants bound themselves to perform certain necessary offices for their over-lord's household, as in the case of Emma de Hutton, whose duty it was to cut out linen cloths for the king and queen, or Robert Testard, who had to maintain a certain number of royal laundresses. A third class of tenures consisted of those which were practically nominal obligations, such as the presentation of a "quhyt feather" for the lands of Balgonie, or a July clover flower for an estate in Hereford, or again the three pepper-corns which were paid in 1348 for Bermeton. Nor was this practice confined to England. A dying queen of Hungary bequeathed a city

and province to one of her court lords on condition that he and his successors should always keep up a certain number of peacocks; and the chroniclers of the Spanish Conquest of Mexico tell us that the great Aztec nobles were often obliged to provide for the repair of the royal palaces, and to pay an annual offering of fruit or flowers in lieu of the military service due for their estates.

The earliest mention of blanch-holdings (so-called apparently from the fact that they were often paid in silver or *white* money) which I have been able to discover is in a charter by Canute, who granted the lands of Pusey, Berkshire, on condition that a certain horn was always treasured in the family, and this valuable heirloom bore the following inscription:

Kyng Knowde geve Wylyyam Perose
Thys horne to holde by thy lande.

These tenures appear to have been frequently granted from the time of the Norman Conquest to the fifteenth century, but we find an occasional instance occurring from that date almost to the present time. Visitors to the beautiful chapel of St. George at Windsor will have seen the two small silken banners which are fastened together on one of the pillars, and represent the rent paid to the crown by the Dukes of Marlborough and Wellington for the splendid estates of Woodstock and Strathfieldsaye respectively. They are supposed to be presented on the anniver-

saries of the battles of Blenheim (fought on the 2d August, 1704), and Waterloo (18th June, 1815).

On the abolition of ward holdings under George II., all the lands which were formerly held by the crown were converted into blanch-holdings, but as there appears to have been a generally understood rule that the obligation of performing any specified duties should lapse if not demanded within a given time, the greater majority of these curious old customs have disappeared. So late, however, as the coronation of Queen Victoria, an interesting service was performed by the lord of Worksop Manor, to whose predecessors Henry VIII. had granted that estate in 1542, on condition that they provided a righthand glove for the king at his coronation, and supported his arm on that day so long as he should hold the sceptre. This right was inherited by the Duke of Norfolk, who officiated in 1838.

Another long surviving custom dating from the time of Edward III. was observed about four hundred years later when the owner of Liston, Essex, presented George III. at his coronation with a number of wafers, and on the same occasion the king received a bowl of porridge from the tenant of Adlington. It is interesting to note that this estate was granted originally to Lezelin, a cook, by William the Conqueror, and it has been supposed that the manor in question was an appendage of the king's cook, as Sheen was of the royal butler. This explains the origin of the duty imposed upon the tenant of making porridge on coronation day.

We find interesting traces of the habits of the times in the service demanded from William de Alesbury, who held lands in Buckinghamshire, and bound himself in return to find straw for the king's bed, and also for the floor of his room, if ever he should chance to visit Alesbury in winter. Three eels were also to be paid at the same time. Should the royal visit take place in summer, straw

had again to be provided for the bed, but grass or rushes for the floor, and two green geese instead of the eels. These services were only to be performed twice a year, even should His Majesty pay three visits in that time. For the fortunate family of Wilmington (who were descended from Robert de Wilmington, a cook to the Earl of Boulogne) in Kent, rent day must have been more honoured in the breach than in the observance, as they were only asked to find a pot-hook for the king's meat whenever he chanced to visit their manor. Rather a trying lot fell to the lot of Eba, Countess of Warwick, who in return for the lands of Hokinorton, Oxfordshire, had the doubtful honour of carving at the table of Edward I. on his birthday, but she was graciously allowed to keep the knife which the king used, as a souvenir of the occasion. John de Rockes of Winterslow, Wilts, must also have felt a responsible person, as when the sovereign happened to visit Clarendon, it was ordained that de Rockes should come to the palace of the king, and "go into the buttery, and draw out of any vessel he should find in the same buttery at his choice as much wine as should be needful for making a pitcher of the claret which he should make at the king's charge, and that he should serve the king with a cup, and have the remainder of the wine after the king had drunk, and the vessel."

Among the blanch-holdings which existed in Scotland are the following: A red falcon and a tercel for the thanedom of Glamis; two falcon hoods for the barony of Muirhouse Edinburgh; three broad arrows for Lochindorb, described as a good center for hunting; the Dewar lands in Glen Dochart, held in virtue of custody of a relic of St. Fillan; the barony of Penicuik for blowing six blasts on a horn on the "moor of the burgh of Edinburgh" when the king should hunt there, and the barony of Carnwath, whose owner was enjoined to present two pairs of shoes, each containing half an ell of English cloth, to the man who was first in a race from

the east end of Carnwath to the Sallow Cross, this to take place on Midsummer Day. The estate of Foulis was granted to Donald Munro in the eleventh century by King Malcolm II. upon the condition that when called upon to do so, he and his successors should always supply the king with a bucketful of snow, no matter at what time of the year this was demanded. But the lords of Foulis had no cause to be uneasy as to the fulfilment of their part of the bargain, for did they not possess a part of Ben Wyvis on which the sun never shone, so that snow remained there all the year round? The service in question was performed for the last time on the night before the battle of Culloden, when it is said that Sir Robert Munro presented the Duke of Cumberland with a bucket of snow for cooling his wine. It must have been rather more difficult to obtain the garland of roses at Christmas time which was demanded of the tenant of Crendon, Bucks, but the thousand clusters of nuts for John, Earl of Warrenne and Surrey would be gathered in due season at Wakefield.

It is curious to find Henry IV. requiring a catapult (described in an old chronicle as an ancient war-like engine to shoot darts) in exchange for the lands of Carlton; and there is a quaint flavour about the terms of the holding for a manor in Salop, by which Robert Corbet bound himself to find one footman in time of war who was to follow the army into Wales, carrying with him a salted hog. On coming up with the soldiers, the man had to deliver a share of the bacon to the king's marshal, and so long as this sufficed to provide a daily dinner for one person, the footman was obliged to remain with the army. Directly it was finished, he was free to return home. Sir Osbert de Longchamp also undertook to follow the king and his army into Wales, and it is specified that he must bring with him a horse of the price of six shillings, a sack of the price of sixpence, and a needle to the sack. The foot-

man, provided by the tenant of Brineston, was only required to follow the army into Scotland, but had to do this barefoot, and armed only with a bow in one hand, and an unfeathered arrow in the other; and he was altogether worse off than Richard Miles, who could return from following the king directly he had worn out a pair of shoes of the value of fourpence.

A grand old mansion in Cheshire, rendered famous in our own time as being the residence of a great living statesman, was formerly held by Robert de Montrault, Earl of Arundel, for the somewhat easy duty of attending the Earl of Chester on Christmas day at Chester, and placing the first dish upon his table, while an oar paid for the estate of Grange, near Hastings, and even this was only demanded when the king happened to sail in that direction. Many tenants fulfilled all obligations by keeping hounds or falcons for their landlords, while others shod the king's horses (and had to replace those which were lamed in the process); but it is difficult to understand the exact significance of one old record, which says that Hugh de Sottelhoe held the lands of Shottesbrook in the time of Henry II. by virtue of fine *coals* for making the crown of the king and his royal ornaments. Were these the original black diamonds?

Even crowned heads were not exempt from the conditions of tenure, for we find that at one time the king of England accepted three hundred pounds of land down from the king of Scotland in lieu of homage for some land in Bedfordshire, and also paid an annual rent of one jerfalcon (one of the varieties of large Arctic falcons). A pound of land, it should be mentioned, is generally reckoned at about fifty-two acres, so the commutation was a very substantial one. A somewhat similar holding to the barony of Penicuik was that of the manor of Horton in Yorkshire, whose tenant was required to blow a horn at stated periods, and I believe that the horn used on these occasions is still carefully preserved.

Such holdings were called "hornblow lands," and "wolf hunt land" was the term applied to some crown property at Mansfield Woodhouse, Notts, which was granted by Henry VI. to Sir Robert de Plumpton in return for his blowing a horn and chasing the wolves, then fairly plentiful, in Shirewood (now Sherwood) forest. The land so granted was one bovat or oxgang, which is about fifteen acres, that being taken as the amount which one ox can plough in a year, and the surname, "wolf-hunter," was to be met with in the district up to the end of the last century.

In some cases a property carried with it the duty of holding a certain office in the state, as, for instance, in the case of Scrivelsby in Lincolnshire, which was for generations the home of the Dymoke family, who for many years regularly provided the "champion of England" at coronation times. We will all agree with the eminent lawyer Coke, who says that the worst tenure of which he had ever heard was the obligation of acting as public executioner. There is an amusing note to the *Ingoldsby Legends*, in which the author states that Jehan de Ketcher acted as provost marshal to the army of William the Conqueror, and received from that monarch a gift of land known by the name of the "Old Bailie," on regular payment of "ane hempen cravate," but, as a matter of fact, I may mention that the name Jack Ketch was applied to hangmen from the time of Richard Jaquett, to whom the manor of Tyburn once belonged.

Lord Grey de Wilton's crest is a jerrfalcon sejant upon a glove, which is a reminder of

the days when his ancestors held the lands of Acton, Buckingham, in exchange for keeping one of these birds for the king, while another reminiscence of ancient times is found in a clause which occurs in the leases of tenants on the estate of Wallingwells, Notts. This clause demands that no attempt shall be made to grow *wood* on the landlord's ground, and the injunction, which dates from hundreds of years back, is maintained to the present day, as is also the obligation on the farmer's side to do so many days' work with cart and horses for his landlord as part payment of the rent. "So long as grass doth grow and water doth flow" is the poetical form taken by a lease of some land in Lancashire, and Adam de Oakes escaped with an equally light obligation when he undertook to pay a halfpenny a year for Pinley, Warwick, to Edward II. As the purchasing power of money was four times its present value in the Stuart times, we must allow for a still more ample expansion at the beginning of the fourteenth century, but in any case the payment was comparatively trifling.

Though the march of progress has brought us countless unmixed benefits, we must sometimes feel a touch of regret that it has also swept away many picturesque customs which were formerly in vogue, and among these we must certainly include the quaint duties and ceremonies which constituted payment of rent, an obligation which in our day has been reduced to a prosaic, if more practical, matter of pounds, shillings and pence.

—*Chamber's Journal*.



THE COURT OF APPEALS OF KENTUCKY.

II.

BY JOHN C. DOOLAN OF THE LOUISVILLE, KY. BAR.

WHEN the Senate failed to confirm the re-appointment of Judges Owsley and Mills in December, 1828, Governor Metcalfe appointed two men in their stead who had been staunch advocates of the "Old Court," in the controversy then recently closed.

They were George Robertson and Joseph R. Underwood. The Chief Justice of the court was the George M. Bibb who had been an ardent "New Court" man and the appointee of a "New Court" governor. As soon as Judges Robertson and Underwood were appointed, Chief Justice Bibb resigned to go to the United States Senate and thus almost in one day a complete change was made in the personnel of the court.

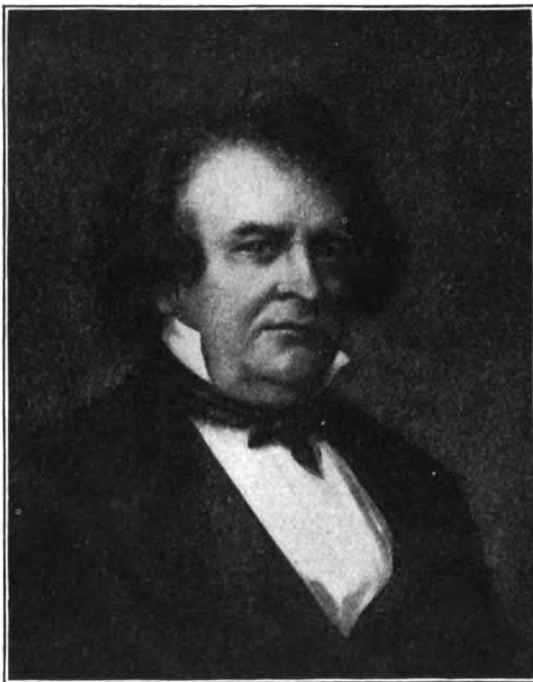
The office of Chief Justice remained vacant from December 16, 1828 to December 9, 1829, when Judge Robertson was promoted to that position and Richard A. Buckner was added to the Court as Associate Justice on December 21, 1829.

During the year 1829, Judges Robertson and Underwood, while yet unused to judicial labors, decided an immense number of

cases and wrote many opinions that would reflect credit on the bench of any state. The work of the court for that year is to be found in Volumes 1, 2 and 3 of J. J. Marshall's Reports.

No higher tribute could be paid to the judicial system of Kentucky, as it existed prior to 1850, than to point to the record of the Court of Appeals for twenty years before Judge Robertson came to the bench and show how the glories of that period were repeated throughout the twenty years after his appointment.

George Robertson was the first Chief Justice of Kentucky who was a native of the state. He was born of Irish ancestors, in Mercer County, on November 18, 1790. In his youth he was a



GEORGE ROBERTSON.

pupil of Joshua Fry who conducted a fine school near Danville, Ky., in the early part of the nineteenth century. When an old man he delighted to relate how as a boy he went to Mr. Fry and telling him of his poverty agreed some day to pay him for his tuition and board if he would admit him to his school.

Mr. Fry was a man of fine education and

finer traits of character occupied with remarkable ability as a teacher. Under his instruction young Robertson acquired a classical training and literary style that characterized his opinions in after years and caused the great but uncouth Ben Hardin to facetiously refer to Dana's Kentucky Reports as "George Robertson's Waverly Novels."

When a little more than nineteen years old, Mr. Robertson married Miss Eleanor Bainbridge and about the same time he was licensed to practice law. The young couple "set up" housekeeping in the buckeye log cabin already mentioned in the sketch of Chief Justice Boyle, with the result that the head of the family was in 1816 elected to Congress as already stated.

He resigned his seat in Congress in order to enter the lower house of the Kentucky Legislature and champion the cause of the "Old Court" in the heated conflict then raging. He was regarded as one of the most influential advocates of his party and was several times sent to the Legislature as its leader. In 1826 he was appointed Secretary of State of Kentucky, but he soon resigned that position. His appointment to the bench soon followed.

After nearly fifteen years' service in the Court of Appeals, he resigned early in 1843 and retired to private life. For more than twenty years he lived in Lexington in the enjoyment of a large practice, surrounded by a circle of young men who crowded about him to receive instruction in the law. To this day many an old lawyer in Kentucky speaks with special pride of "my old preceptor, Judge Robertson." His affection for his students is even yet a matter of comment. When he came to the bench a second time in 1864, he could not resist a leaning toward one of his old pupils who appeared at the bar before him. The writer once heard two of his admirers in conversation. One said that Judge Robertson sought to aid his favorite by finding an authority in point for him. "Yes," replied

the other, "he would do more than that, he would find a *fact* for him if he needed it to win his case." All of this was by way of tender recollections and by no means in harsh criticism.

In August, 1864, while the Civil War was in progress and Kentucky was being occupied by the Federal troops, an election for Judge of the Court of Appeals under the Constitution of 1850 came on. Two of the candidates most favored by the people were suspected by the Federal authorities of disloyalty to the Union and they were forced to leave the state to avoid military arrest. A candidate was brought out by the northern sympathizers and supported by the military power. At this juncture some of the leading lawyers of the state met at Lexington and decided that ex-Chief Justice Robertson, then nearly seventy-five years old, must enter the race. He did so in order to redeem the state from the rule of a court chosen at the point of a bayonet. In two days' time, news of his candidacy was carried by swift couriers throughout the district, and before the week was half gone he was triumphantly elected.

He took his seat in the court for the second time in September, 1864, and continued to serve until 1871 when he again resigned. In the last year of this period, he was again Chief Justice under the constitutional provisions already explained.

During his last term of service, some of the ablest opinions that appear in the Kentucky Reports were handed down by Judge Robertson.

When in the seventy-fifth year of his age, he delivered an opinion in the court in the case of *Griswold v. Hepburn*, reported in 2 Duvall, 20-76, in which he held the "Legal Tender Act" passed by Congress in 1862 to be unconstitutional. This case was taken on writ of error to the United States Supreme Court, where, as *Hepburn v. Griswold* (8 Wallace, 603), it was affirmed in an opinion delivered by Chief Justice Chase.

This is the famous case in which Chief Justice Chase reversed an opinion given by himself while Secretary of the Treasury and this case was finally overruled by *Knox v. Lee* (12 Wallace, 457), sustaining the constitutionality of the act after new judges had been added to the court.

Another interesting case decided by Judge Robertson during his last term on the bench is that of *Grigsby v. Breckinridge* reported in 2 Bush, 480-513.

Robert J. Breckinridge, a member of the Kentucky family of that name, and himself an eminent Presbyterian divine, had married the widow of Alfred Shelby. Upon her deathbed she gave to her daughter by her first marriage a large number of personal and confidential letters received by her from her first husband during her girlhood and marriage to him and also a large number of similar letters received by her from Dr. Breckinridge during her widowhood and her marriage to him.

After her death, Dr. Breckinridge qualified as her administrator and demanded possession of all the letters. This was refused and litigation resulted. Judge Robertson delivered the majority opinion of the court refusing to allow Dr. Breckinridge to have any of the letters and defining the rights of the sender and the recipient of friendly personal letters to their possession or control.

These two cases are mentioned, the first, because of its vast importance in the constitutional history of the whole country; the last, because it presents a novel and most interesting question. Both are well worth perusal, as well for the matter which they contain as for their style and force of expression.

It would be impossible to cite even a small proportion of the cases decided by Judge Robertson, or argued by him at the bar, that have since become "causes celebres." He had the most delightful literary style and in his opinions he has enriched

the reports of his state and added to its reputation as the home of oratory and classic elegance.

In the last years of his public life his judicial "eye was not dimmed nor his natural strength abated." He never became a slave to old laws or practices. On the contrary he expressed himself as fearing a growing tendency to disregard precedents and "hew to the line" in each particular case before him.

On September 5, 1871, just after administering the oath of office to Governor Preston H. Leslie, he turned and most unexpectedly resigned his commission as Chief Justice. On May 16, 1874, he died in the eighty-fourth year of his age at his home in Lexington, Ky.

No higher tributes to his learning, his talents, and his public services can be paid than is contained in the memorial adopted by the Court of Appeals on the occasion of his death. In speaking of the history and jurisprudence of the state they are said to "have been thus far molded and matured by the great mind of Judge Robertson as much if not more than by that of any other Kentuckian, living or dead."

JOSEPH R. UNDERWOOD.

The early life of Joseph R. Underwood was filled with adventure and thrilling experiences. He was born in Virginia in 1791, of excellent parentage. When he was twelve years old, he came with his maternal uncle to the "Green River Country" in Kentucky where he was placed in the best schools of the section. When the War of 1812 came on, he joined the first company of volunteers raised in Lexington to avenge the massacre of the Kentucky troops in the River Raisin. The regiment to which he had belonged was defeated in a battle with the British and Indians near the present site of Toledo, Ohio, and he with others taken prisoners. Contrary to the terms of the surrender, the prisoners were allowed to fall

into the hands of the Indians. Many of them were tomahawked or shot down in savage butchery. Others, including the young Lieutenant Underwood who had been severely wounded, were first stripped of their outer clothing, then hemmed up in an old fort surrounded by Indians who now and then shot some poor unfortunate who happened to attract attention, and finally they were forced to "run the gauntlet" between the river and a line of Indians 150 yards long who amused themselves by throwing war clubs and tomahawks at them, and occasionally varying the exercises by shots from rifles. After a miraculous escape from these perils, the survivors were confined in a fort. In giving an account of his experiences many years after, Judge Underwood said that he heard the angry discussions among the captors as to a general massacre, but this was averted by the timely arrival of the famous chieftain Tecumseh, who is said by another witness to have enforced his orders by threatening to tomahawk anyone who disobeyed him.

So much for the service that Joseph R. Underwood in his youth rendered his country. His gallant conduct and heroic sufferings in behalf of the great Northwestern Territory form but a small part of what the sons of Kentucky have done and endured for their neighbors in the North. Is it not worth while to recall these facts of history in these later days?

When at last he was released by his captors, young Underwood made his way back to Kentucky. He was soon licensed to practice law. After enjoying various political honors, he was on December 23, 1828, appointed Judge of the Court of Appeals at the same time with George Robertson. In 1835 he resigned the office and thereafter served eight years in the lower House of Congress. He was also United States Senator for the full term of six years. He repeatedly served his state in the Legislature.

After his retirement from public life in 1863, he took up again the practice of law at his home in Bowling Green, Kentucky, where he died, August 23, 1875, at the age of eighty-five years.

His judicial record has already been referred to in the sketch of his colleague, George Robertson. The Court of Appeals has never been stronger or its reputation higher than in the days when Joseph R. Underwood adorned its bench.

SAMUEL S. NICHOLAS.

The subject of this sketch was born in Lexington, Ky., in 1796. He was the son of Col. George Nicholas, one of the most distinguished Kentuckians of his day. On his father's side he was descended from the best Virginia stock—his grandfather having been prominent in colonial affairs and his father a Revolutionary soldier, a lawyer of ability and a member of the Convention that ratified the Federal Constitution of 1787.

On his mother's side he had two uncles, Samuel Smith and Robert Smith, both distinguished citizens of Maryland. The former was for twenty-five years a Representative or a Senator in Congress from his state. The latter was Secretary of the Navy under Jefferson and Secretary of State under Madison.

His father having died when he was only two years of age, young Nicholas was sent as a boy to his uncle in Baltimore for whom he had been named. While under the care of his uncle, he was sent on several voyages to different parts of the globe. When he reached man's estate, he returned to Kentucky and took up the study of law under George M. Bibb, after which he removed to Louisville and entered upon the practice. On December 23, 1831 he was, appointed Judge of the Court of Appeals. He served in the court less than three years and resigned about the same time with his associate, Judge Underwood. His successor was Judge Thomas A. Marshall.

After his retirement from the Court of Appeals, he resumed the practice of law in Louisville. In 1844 upon the resignation of Chancellor George M. Bibb he was made second Chancellor of the Louisville Chancery Court, a position which he held until 1850. In the mean time, the third constitution of the state had gone into effect, providing for an elective judiciary. Judge Nicholas though an able and impartial jurist, was not a popular man and he could not bring himself to make a canvass before the people for the office. He accordingly resigned and Judge Henry Pirtle was selected to succeed him.

Judge Nicholas when holding court was courteous and attentive in a marked degree, but when off the bench he had a stiffness and formality of manner that repelled those who did not know him intimately. On the street, he walked with an air of abstraction and seldom greeted or recognized anyone. It is related that on one occasion he was a candidate for some office and one of his closest friends swore that if Nicholas recognized him on the street during his campaign, he would do his best to defeat him, for such unusual conduct would be demagogism pure and simple.

After his resignation of the Chancellorship, Judge Nicholas was in 1850 appointed one of the commissioners provided for in the new constitution to revise the statute laws of the state. His associates in the important work were Charles A. Wickliffe and Squire Turner. All three of these men were able lawyers and as a result of their statute labors the first codification of statute laws in Kentucky was adopted by the Legislature under the title "Revised Statutes of Kentucky."

The opinions of Judge Nicholas were decidedly laconic in style. He was a man of few words, who spoke seldom, but always to the point. He rarely argued the case in his decisions, but contented himself with stating the facts with simply enough of

reasoning to sustain the conclusions announced. One of his most elaborate and interesting opinions is in *Gray v. Combs*, (7 J. J. Marshall, 478), where he controverts the rule laid down by Blackstone that "the law will not suffer any crime to be prevented by death unless the same if committed, would be punished by death." Judge Nicholas denounces the rule of Blackstone as "draconic" and as unsupported by precedent in most civilized countries. With respect to the rights of self-defence he says, "But it is emphatically a right brought by the individual with him into society and not derived from it." Accordingly he held that a man has a right to protect his property in a warehouse against burglars or thieves by the use of a concealed spring-gun and the person injured "*flagrante delicto*" has no cause of action for the injury. Judge Nicholas died at his home in Louisville in November, 1869, aged seventy-three years.

EPHRAIM M. EWING.

After the resignation of George Robertson in April, 1843, Judge Ephraim M. Ewing was promoted to the Chief Justiceship. He had shared in the labors of the court and contributed greatly to its reputation since his appointment as Associate Justice on March 5, 1835. It seemed therefore eminently fitting that he should have succeeded his great co-laborer, Chief Justice Robertson. By his appointment the court lost none of its prestige. His opinions are contained in fourteen volumes of Kentucky reports from 3 Dana to 7 Ben Monroe inclusive.

Chief Justice Ewing was born in Davidson County, Tennessee, on December 4, 1789. He was the son of a distinguished Revolutionary officer, Gen. Robert F. Ewing. He was educated at Transylvania University when it was the seat of culture of the West, and early in life he located in Kentucky. He was repeatedly honored by the people of his adopted state, and after a

period of more than twelve years' service in its highest court, on June 1, 1847, he resigned the arduous duties of his station to take up the less exacting, but more lucrative practice of law. At the bar he was very successful and he accumulated quite a large fortune. This he generously bestowed upon various institutions of learning in Kentucky and Tennessee. He died June 11, 1860, having the greatest respect of all the people of both his native and his adopted state.

THOMAS A. MARSHALL.

The ninth Chief Justice of Kentucky (and the last under the appointive judiciary system) was Thomas A. Marshall commissioned as Chief Justice on June 1, 1847. He had served as Associate Justice of the Court since March 18, 1835.

When the constitution of 1850 went into full operation in May, 1851, the Court of Appeals was organized on the basis of popular elections. So great was Judge Marshall's reputation and his popularity that he was easily elected and he served as Judge of the Court under the new constitution until August 1, 1856, when his term expired. During the last two years of this term, he was again Chief Justice of the Court.

Again on February 12, 1866, he was appointed Chief Justice by the Governor to fill the vacancy caused by the death of Chief Justice William Sampson and he held the position this time until a successor could be chosen at the election held in August, 1866. Thus he was Chief Justice three times, twice by appointment and once by popular election. He served in the court sixteen years under the constitution of 1799 and nearly seven years under the constitution of 1850.

Few Judges of the court have so long held the confidence of the people and no other has ever so approved himself under both systems of selecting Judges.

Thomas A. Marshall was the son of

Humphrey Marshall, the Kentucky historian and statesman, and was born in Woodford County, Kentucky, January 15, 1794. He is not of the same family as Chief Justice John Marshall, whose father also lived in Kentucky. He had one brother, John J. Marshall, who was the official reporter of the Kentucky Court of Appeals.

When only seven years of age, he was taken by his father, then United States Senator from Kentucky, to Washington City, where it is related that one day he climbed up one of the large pillars in the vestibule of the old Capitol. Some one asked him what he was doing. "I am writing my name," he said, "and I want to see if it will be here when I come to Congress."

This ambitious spirit, developed so early in life, carried him through Yale College with distinction and secured for him numerous political honors and eventually a seat in Congress for the two terms from 1831 to 1835. In March of the last year he was made Judge of the Court of Appeals.

He died in Louisville, April 17, 1871, in his seventy-eighth year, and was buried at his old home in Lexington, Kentucky.

In all his relations in life, he brought credit to the honored name he bore and he ranks as one of Kentucky's foremost jurists.

JAMES SIMPSON.

When the constitution of 1850 went into full operation, it not only vacated the office of every Judge in the state and substituted an elective for an appointive judiciary, but it provided for some radical changes in the law and in the practice of the courts. It was made the duty of the General Assembly to codify all the statute laws and to adopt a code of procedure in civil and criminal cases.

Nothing like this had ever before been attempted in Kentucky and upon the new courts chosen in a new method devolved the duties of construing the new constitution and deciding all the novel questions of

practice and of substantive right that grew out of the changed situation.

Fortunately for the people of Kentucky they placed on the bench of their Court of Appeals men equal to the responsibility imposed upon them.

Four Judges of the court were chosen at the election held in May, 1851, viz: James Simpson, Elijah Hise, Thomas A. Marshall and B. Mills Crenshaw. Judges Simpson and Marshall had been members of the court under the old constitution—Marshall having been Chief Justice and Simpson having been commissioned Associate Justice on June 7, 1847.

Prior to his service on the Court of Appeals, Judge Simpson had been for twelve years on the bench of the Circuit Court. It is said that not one of his decisions at *nisi prius* was ever reversed by the Court of Appeals. No higher meed of praise can be paid to him than to say that in all respects he was worthy to fill the exalted office to which he was called.

The advocates of an elective judiciary have great reason to congratulate themselves upon the men who have been honored with judicial position in Kentucky since 1850, and to the first Court of Appeals under the system is much of the credit due. Judge Simpson's connection with the court for ten years after the constitution of 1850 gave to it a conservatism and a dignity that well became a court whose history has been the pride of the Commonwealth.

In the allotment of terms provided for in the new constitution, Judge Simpson drew the shortest term of office and therefore became Chief Justice of the court. His first elective term of office expired in August, 1852, when he was again chosen for a full term of eight years, ending in August, 1860. During the last two years of this term 1858–1860, he was again Chief Justice by operation of the law. He declined to stand for re-election when his last term expired.

For more than twenty-five years Judge Simpson served his state in judicial position. During all that time he enjoyed, to the full, the absolute confidence of his people, and he established a reputation for learning and ability that has made his opinions of the highest authority throughout the Union. The cases decided by him involve every branch of litigation then current and they are to be found in the official reports of Kentucky from 8 Ben Monroe to 3 Metcalfe inclusive.

His private life was as pure as his official life was spotless.

He was born of good parentage, in Belfast, Ireland, on March 16, 1796. His father was a man of culture who was compelled by the misfortunes of his unhappy country to emigrate to America. He settled in Clark County, Kentucky, when his son James was very young. Here the future Chief Justice made good use of such educational facilities as the schools of the country afforded, but most of all he profited by the instruction he received at the hands of his honored father.

Coming to the bar at an early age he represented his district in each House of the State Legislature before his appointment in 1835 to the office of Circuit Judge. Thenceforward he ranked as one of the ablest and purest jurists that the state ever had.

After his retirement from the bench he took up the practice of law, at Winchester, Kentucky, where he died May 1, 1876, in his eighty-first year.

ELIJAH HISE.

When Chief Justice Simpson's first term of office under the new constitution expired in 1852, Elijah Hise, as the Judge having by allotment the shortest time to serve, became Chief Justice for two years by operation of the law. His term of service in the court was brief extending only from May, 1851, to August, 1854.

Before he went on the bench, Judge Hise

had distinguished himself in the diplomatic history of the country by the treaty which he negotiated with Guatemala while he was minister to that country under President Polk. He had been sent to Guatemala to supersede a minister who had involved this country in some disputes with Great Britain over the proposed canal and British occupation of that region. He went to his post with instructions that practically tied his hands from opposing the plans of Great Britain. When once on the ground, he began to study the situation for himself and with his characteristic foresight he perceived the immense advantage to the United States to accrue from building and controlling a canal across Nicaragua.

In this he was nearly fifty years ahead of his people at home. Despite his instructions, on his own responsibility he secured a treaty with the Central American States that gave to his country more than she has yet acquired after fifty years of misguided "diplomacy."

When his treaty came before the authorities at Washington, it was pigeon-holed for fear of giving offence to Great Britain.

Such a man was Judge Hise, quick to perceive, bold to act, and fearless to insist upon what he thought right.

When his term of office expired in August, 1854, Judge Hise retired from the bench. Ten years later he was elected to the lower House of Congress and subsequently re-elected, but his death came on May 8, 1867, before he entered upon his second term. He was born on July 4, 1801, in Pennsylvania. He was a man of great dramatic power, in fact, a born actor who would have distinguished himself on the stage, had he chosen that theatre of action.

He was one of the foremost orators of a State that has been famous in that respect. His untimely death, at the beginning of what would certainly have been a long and useful career in Congress during a critical period of his country's history, was the occa-

sion of great sadness among his party associates. He was an unswerving Democrat whose voice in party councils and in the affairs of State was greatly missed by his friends for many years.

B. MILLS CRENSHAW.

When the term of Chief Justice Hise expired in August, 1854, Thomas A. Marshall again became Chief Justice as already stated, for two years. In August, 1856, B. Mills Crenshaw, the last of the four Judges elected in May, 1851, became Chief Justice and he continued to preside over the court until his death, which occurred on May 5, 1857.

Previous to his elevation to the bench he had served his district with signal ability in both houses of the State Legislature. His term of service in the court showed him to be possessed of the judicial temper and gained for him the admiration of the bar and the people of the State.

ZACHARIAH WHEAT.

The death of Chief Justice Crenshaw caused a vacancy in the office, which was filled by the election on June 15, 1857, of Hon. Zachariah Wheat.

Judge Wheat had previously served on the Circuit Court bench for three years under the old constitution of 1850. He then declined re-election as Circuit Judge.

His term of service in the Court of Appeals was little more than a year, during which time he presided over the court as Chief Justice. He was defeated for re-election because he espoused the cause of the American, or "Know Nothing" party which had become very unpopular in the State.

He was born in Bourbon County, Kentucky, of Virginia parentage, on July 26, 1806, and died at his home in Shelbyville, Kentucky, after passing his seventieth year.

HENRY J. STITES.

Judge Henry J. Stites, the fourteenth man

to occupy the office of Chief Justice of the Court of Appeals of Kentucky, was born in Scott County, Kentucky, in 1816, and he died at his home near Louisville on the 3d day of April, 1891. When he was very young his parents removed to Christian County, where he grew to manhood. He was educated in the schools of that county and at an early age he engaged in mercantile pursuits but soon abandoned them to take up the study of law. When he was twenty-five years of age he was admitted to practice.

In 1851, he was elected Circuit Judge by his circuit at the first election under the new constitution. So well did he acquit himself of his duties, that in 1854, he was elected Judge of the Court of Appeals for a full term of eight years to succeed Chief Justice Hise. Under the law he became Chief Justice for the last two years of his term.

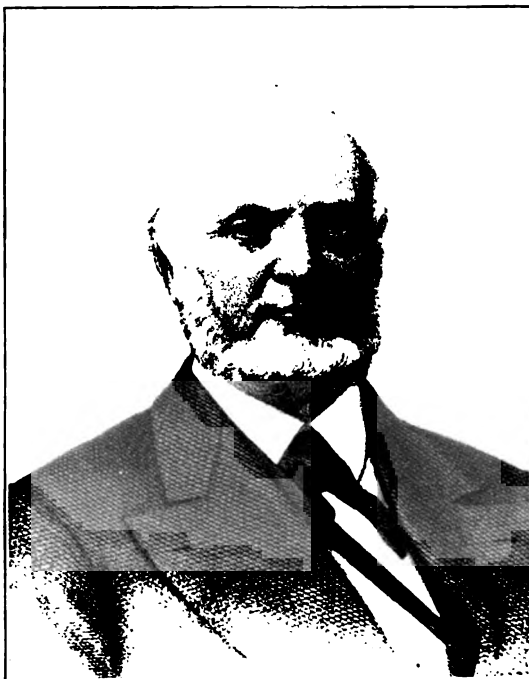
His position in the conflict between the North and the South made it necessary for his safety that he withdraw to Canada and he was not a candidate for re-election. At the close of the war he returned to Kentucky, and took up his residence in Louisville. In 1867 he was appointed Judge of the Jefferson Court of Common Pleas to fill a vacancy and he was three times elected to the same position by the people. He retired from the bench in 1886, having served eight years in the Court of Appeals and nearly

twenty-four years on the bench of the Circuit or Common Pleas Court.

Many perplexing questions came before him while he was Judge of the Court of Appeals and his opinions are strong, terse and logical. As a *nisi prius* Judge he was *par excellence*.

For nearly twenty years he presided in Louisville over the most important common-law trial court in the State and his conduct

of the court secured a full and expeditious administration of justice. He had such an absorbing love of the right and was so intent upon administering it that he could never understand the chagrin of a defeated litigant. Such was the judicial make up of the man. He abhorred all forms of trickery and chicanery. His influence on the lawyers who practiced before him was perhaps more marked than that of any other man in Kentucky since the days of Bibb. He inculcated and en-



HENRY J. STITES.

forced the highest ethics of the profession.

His nephew and stepson, Henry Stites Barker, is now one of the efficient Judges of the Jefferson Circuit Court sitting at Louisville.

ALVIN DUVAL.

Hon. Alvin Duvall, elected Judge of the Court of Appeals in August, 1856, became Chief Justice in August, 1862, and served in that capacity until August, 1864, when

his term expired. He was a candidate for re-election but General Stephen G. Burbridge, then commanding the Federal troops in Kentucky, charged him with disloyalty to the Union, had his name stricken from the poll books and refused to allow him to be voted for. He even ordered the arrest of Judge Duvall, thus forcing him to leave the State and go to Canada.

So great was the indignation in Kentucky over the intervention of the Federal troops in a state election, that ex-Chief Justice Robertson was brought out in opposition to the candidate of the military power and triumphantly elected, though the voters of the district had only a few hours' notice of his candidacy.

After his return from Canada, Judge Duvall resumed the practice of law at Georgetown. In 1866 he was appointed reporter of the Court of Appeals and he removed to Frankfort. He edited and published the two volumes of Kentucky reports bearing his name under specially difficult circumstances, the records of the courts having been destroyed by fire in the clerk's office that year, with the exception of such opinions as were in Judge Duvall's possession and reported by him.

In August, 1866, the election of the clerk of the Court of Appeals came on. This was the first state election after the Civil War and the Democrats throughout the State were aroused in a determined effort to regain their ascendancy. Judge Duvall was put forward by them as their strongest candidate and, despite the bayonet rule that had once prevailed against him (possibly, *because* of it), he was chosen by an overwhelming majority of 50,000 votes. It took nearly thirty years for the Republicans of the State to recover from the effects of the defeat.

After his term of office as clerk expired, Judge Duvall again took up the practice of law in Frankfort, being retained in many important cases before the Court of Ap-

peals. He died in 1898, at the advanced age of eighty-five years.

In his person, Judge Duvall was a very small man, less than five feet in height. He had, however, a powerful voice and he was a most eloquent stump speaker. It is said that in one of his political canvasses, he had just finished a very strong appeal to the voters assembled at an old-time barbecue and had retired to the shade of a neighboring tree to rest on the grass, when a sturdy six-footer rural citizen came up and after circulating around him slowly, said, "Well, I'll be darned, if you ain't the biggest man to be such a little one, that I ever seen!"

In this estimate the people of Kentucky have agreed with the countryman.

JOSHUA F. BULLITT.

On March 20, 1861, the subject of this sketch was elected Judge of the Court of Appeals to fill a vacancy caused by the death of Judge Henry C. Wood. He had previously been a candidate for the same office in 1857, against Judge Wheat, but he had then been defeated by the narrow margin of thirty-seven votes.

In August, 1864, he became Chief Justice of the court, but, along with Judge Duvall and many other prominent citizens of the State, he had incurred the displeasure of the military dictator then in power in Kentucky and he was arrested and sent out of the State.

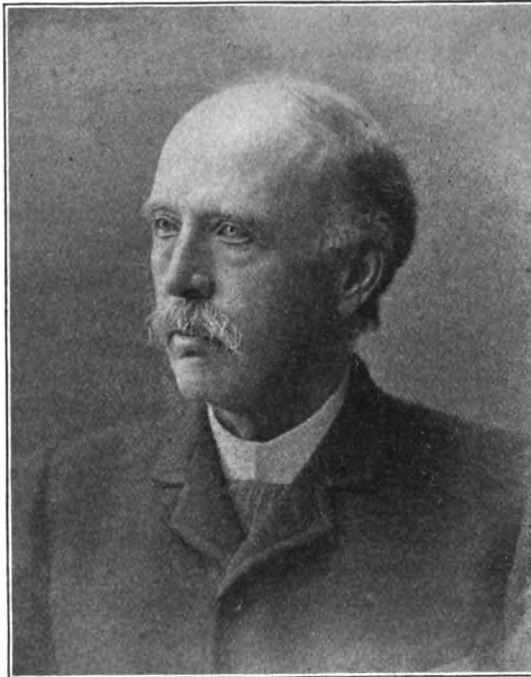
He returned and resumed his place on the bench but after two or three weeks he was compelled by threats of execution to fly to Canada for safety. While he was absent and wholly undefended, the State Legislature under military pressure, on June 3, 1855, passed a joint resolution "addressing" him out of office. This is the only instance of the kind in the history of Kentucky. It could not have occurred in this case except for the passions of war and the despotic military power that had been imported into the State.

Judge Bullitt at the outset of the war had been an ardent Union man, but like many southern born patriots, his sentiments changed when the schemes of subjugation and emancipation and arming the negroes came to the surface as "war measures." For this he was proscribed by military power and in effect banished from his native land.

When the passions of the war subsided, he returned to his home in Louisville and resumed the practice of law. In 1871 he was made one of the commissioners to revise the Codes of Practice of the State. He has at great labor edited and annotated two editions of the Codes, and for years he was regarded as the best versed lawyer in Kentucky in matters of practice. He died at his home near Louisville, in February, 1898.

Judge Bullitt came of a family that has long been distinguished in the annals of Kentucky. He was born on February 22, 1822. In the paternal line, he was descended from Capt. Thomas Bullitt, who in 1773, first surveyed a town site where Louisville now stands. On his mother's side he was the grandson of Joshua Fry, one of the earliest citizens of Kentucky, the teacher of Chief Justice Robertson and many other distinguished men of his day.

Judge Bullitt was educated at Center College, in Danville, Kentucky, and at the University of Virginia.



JOSHUA F. BULLITT.

WILLIAM SAMPSON.

After the removal of Chief Justice Bullitt from office, Governor Bramlette on June 5, 1865, appointed his personal friend, William Sampson, to fill the vacancy until an election could be held. At the ensuing election he was chosen by a close vote to fill out the remainder of Judge Bullitt's unexpired term. His views on the political questions of the day prevented him from becoming popular

in the State. He was an able lawyer who had carved out his own destiny and had well qualified himself for the duties of his trying position. He did not live long enough to prove the full measure of his ability as a Judge. His health began to break down soon after he went on the bench and he was compelled to leave Frankfort for his home in Glasgow, Kentucky, where he died on February 5, 1866.

Upon his death, ex-Chief Justice Thomas A. Marshall was named to suc-

ceed him and thus for the third time he came to preside over the highest court of the State.

BELVARD J. PETERS.

In August, 1860, Belvard J. Peters, then fifty-five years of age was elected Judge of the Court of Appeals of Kentucky. He served a full term of eight years and was elected for a second full term. When his last term expired in August, 1876, he declined to stand for re-election, and having passed beyond the allotted three score years

and ten, he retired to spend his last days in the home of his early manhood.

The sixteen years of his service on the bench of the highest court of the State covered the most critical point in its history. The so-called "armed neutrality," which the State at first adopted in the Civil War, proved wholly ineffectual for its protection. Its soil was invaded by first one force then another. When at last the Federal power gained the ascendancy, the most stringent war methods were resorted to and had Kentucky been a "rebellious" State or a conquered territory, it could scarcely have suffered more from military despots.

When the actual clash of arms had ceased, there came the weighty problems of the reconstruction period, when the crumbling institutions of the Southland were made to give way before the iron hand of a fate that had willed it so, and the citizens called on the judiciary for the protection of their lives, liberties and rights of property, more loudly than ever before.

The growth of our civilization has through all time been gradual and the institutions that we boast of as the cornerstone of our liberties are the product of centuries of development. Not so the changed conditions imposed by the Civil War upon Kentucky and the South. Without time for adaptation to circumstances, the statesmen of the South were forced to accept a policy that their people knew not, and the courts of the land, where fortunes had been swept away and sacred contracts broken, were called on to lay aside all fear and favor and to dispense equal and impartial justice.

That Belvard J. Peters was equal to this responsibility can be said without qualification. More than this cannot be said of any man. His ripened judgment, his purity of life and his integrity of purpose peculiarly fitted him for judicial service in times that try men's souls. Sixteen volumes of Kentucky reports (from 3 Metcalfe to 12 Bush, inclusive), show his labors and his judicial fitness.

He was twice Chief Justice of the court, 1866-1868, and 1874-1876.

Judge Peters was born in Virginia on November 3, 1805, in the dawn of the century, and he lived until its closing twilight, passing away in 1899, the oldest and the most venerated of Kentucky lawyers.

It is not the purpose of these sketches to eulogize any of the honored men whose names are mentioned here. Even if it were it would be difficult to cull from Judge Peters' long life of good works, special deeds for special mention.

He was an able, just and fearless Judge and an upright citizen.

RUFUS K. WILLIAMS.

Rufus K. Williams was in August, 1862, elected from the western district of the State a Judge of the Kentucky Court of Appeals. He served a full term of eight years and by the Constitution was Chief Justice from 1868 to 1870.

He had long been prominent in the affairs of his section and in 1860 took part in the convention that nominated John C. Breckinridge for president. He was, however, opposed to disunion and during the Civil War his sympathies were on the northern side. Though entirely free from bias, his opinions on questions of a political character coming before the court showed the tendency of his mind to sustain the measures of the dominant party in Congress.

His dissenting opinion in *Griswold v. Hepburn*, (2 Duvall,) in which he upheld the constitutionality of the "Legal Tender Act" shows at once the bent of his mind and the force of his argument.

He also dissented in the case of *Grigsby v. Breckinridge* cited in the sketch of Chief Justice Robertson.

His opinions are always vigorous and strong and he added much to the prestige of the court.

After his term of office expired he left Kentucky and located in Utah. He was succeeded on the bench by Hon. William Lindsay.

LEAVES FROM AN ENGLISH SOLICITOR'S NOTE BOOK.

IX.

THE LADY OF THE MANOR.

BY BAXTER BORRET.

(Registered at Ottawa in accordance with the Canadian Copyright Act.)

READERS of *The Green Bag* will probably have read in English text-books on real property something about the curious old feudal tenure of copyhold; but no one who has not had personal experience of holding manorial courts, and searching the ancient rolls of manors, can appreciate what a store of interesting information is to be gathered in the process. For in manors whose records are properly kept, ancient family pedigrees, and the changes of ownership of distinct parcels of land can be traced back for centuries; and many a strange glimpse is afforded of local customs in the towns and counties of England. In theory a well kept manorial roll should provide the two great *desiderata* of real property law reformers, a register of land and of title in one. But the rapacity for fees shown by stewards who have the custody of the rolls, and through whom alone devolutions of property, and changes of ownership can be transacted and recorded, and the diversity of customs of manors as to fines and heriots, and free bench (which corresponds to widows' dower) all have combined to make tenants desirous of enfranchising their holdings, so that copyhold tenure is slowly but surely dying out. In every point of view it is an anachronism in the present day, and, no doubt, another generation will see the complete abolition of this very interesting old tenure.

Part of the duty of the steward of a manor, who is usually a solicitor, is to hold periodical courts, at which heirs and devisees, and purchasers of copyhold parcels are admitted by livery of seizin after surrender to the steward as representative of the lord or lady

of the manor. At these courts a homage, or jury of copyholders, is sworn and they find facts, such as the death of a tenant, and the heirship of his customary heir, or the right of a widow to her free bench, all of which findings are duly recorded by the steward in his minutes of the court, and subsequently entered by him on the rolls of the manor. The court usually concludes with a dinner given by the lord or lady to the tenants, at which the steward presides. And here the fun, which has by no means been lacking during the holding of the court, really begins in earnest. Here are to be seen in all their glory the bailiff, the pound-keeper, the ale-taster, the crier, and other office-holders of the court, as also the small tenant-farmer, the oldest inhabitant, the youngest country yokel, and, as the feast closes, all ingloriously drunk. Here the student of ancient folklore, of county history, of local minstrelsy, can revel at pleasure, and pick up scraps for future development into county history.

I well remember being asked by my old chief, to whom I served my articles in Lincoln Inn, to accompany him one day into Berkshire, to assist him in holding a court, and entering up the minutes of the findings of the homage. The holding of this court had been rendered necessary, if I remember rightly, by the death of the lord, who had by will devised the manor to his widow; and, according to the custom of that particular manor, a fine had become payable by every tenant in respect of each parcel of his holding, as an acknowledgment of fealty to the lady. I must not, even after the lapse of so many years, write a word which would betray

the identity of the manor, or of the beautiful widow who thus became the lady of it; surpassingly beautiful she appeared to me in her widow's cap, and deep mourning attire; I was young and susceptible in those days, and I candidly confess that her beauty, and the calm grace of her demeanor, made an indelible impression upon me, as my chief and I sat at her hospitable board in the dining-room of the old manor house, previously to the holding of the court. I must not dwell on the amusing incidents attendant on the holding of the court, the beautiful simplicity with which the homage found all the facts which the steward directed them to find (I hope correctly) upon the most insufficient evidence. I remember there was one witness whom I had to examine as to a claim of heirship; when I asked him what was his occupation or calling in life, he answered grandiosely, "I call myself a publicity agent," and, on my pressing for a rather more definite answer, his son enlightened my ignorance by cailing out, "the old 'un is a bill poster."

After the holding of the court I was deserted by my chief, who had accepted an invitation to dine with the lady of the manor, (happy man!) and I was left to preside as his substitute at the tenants' dinner held in the village inn. This was a trying ordeal for a young man unaccustomed to such a function, for on me devolved the duty of proposing the customary after-dinner toasts, "the Queen," "the Church" (responded to by the courtly old rector of the parish, who sat at my right hand and prompted me in the discharge of my duties). I proposed the health of the lady of the manor, with all the eloquence I had at my command (pray remember, reader, I was at a very susceptible age), after which the old rector retired, other toasts followed, and many songs, and the fun became fast and furious. My neighbor on my right hand now was the undertaker of the nearest county town, who had a small holding in the manor, and who regaled me

with various grim stories incident to his calling in life.

When I rose to go the undertaker insisted on walking with me to the railway station, where, as he told me he had to meet a corpse coming up from Bath, and he must not keep it waiting. Our conversation as we paced up and down the platform of the railway station waiting for the arrival of the train bearing his corpse up from Bath, left a vivid impression on my memory. I must try to reproduce it *verbatim*.

"Well, sir, you did propose the lady's health, fine sir; could not have done it better if you had been a hauctioneer selling the manor, sir."

"Thank you for the compliment, Mr. Mould. Lady B. is certainly a very beautiful woman, and one could not but be touched by the sight of such beauty stricken down with so heavy a sorrow so early in life."

"Sorrow—ahem—well you see sir, you're very young yet; but when you come to my years, and see all the ins and outs of life as I do, you will come to know that there are widows and widows. Lord, sir, there are some of them as thinks nothing of it, but just as to how they will look the first time they have to go to church in their new mourning. Not that I'd presume to say one word against Lady B. who paid for the funeral right down handsome, but she do seem to me a cool 'un."

"Cool, what do you mean by cool, Mr. Mould? I own that her calm self-possession so soon after the sad event seemed to me marvellous, but I should hardly like to use the word 'cool.'"

"Ah! sir, you're but a very young man yet, sir; now we as have to go into houses at times of bereavement, we gets to see behind the scenes, like, and comes to know the world. Now, would you believe it, sir, I am quite prepared to bet you a pair of black kid gloves that by this day twelve months she'll not be Lady B. at all but Lady D. instead."

"I never bet, Mr. Mould, and it would seem heartless to make a bet on such a subject. But no doubt you see more of the ins and outs of life than I do. Tell me what makes you so ready to offer such a bet?"

"Well, you see it's this way. I was on duty at the funeral, and as Lady B. was chief mourner, and rode next to the hearse, I was holding the door of the first mourning coach for her, when Sir George D., he stepped forward and offered her his arm, and I heard him say to her, 'Oh, Lady B.' he says, 'if only I dared to hope.' 'Hush,' says she quick like, 'not to-day of all days, dear Sir George, but I shall be at home and all alone to-morrow afternoon,' says she, and she gives him one look, and got into the mourning coach, and I shut the door and stepped up by the driver."

"Mr. Mould, Mr. Mould," said I, "this is truly shocking. Who is Sir George D.?"

"Don't you know Sir George D., sir? You must be quite a stranger in these parts not to know Sir George D. Why, sir, he is an old soldier from Hindia, who has been as good as dead twice since he came back, and twice he's been and disappointed me; but I'll bet a pair of black gloves I'll have him yet, sir, before I give up my business. His house adjoins Lady B.'s at the end of the Park, and ought, by rights, to belong to it, as I have heard Lady B. say in her soft way before now, and he has £50,000 in consols atop of that, and that's what she's after or my name is not Mould."

"Mr. Mould, Mr. Mould," said I, "this is really scandalous. Do you mean to tell me that any lady, so soon after her bereavement—"

"You're but a very young man yet, sir; I could tell you something that would make you open your eyes a good deal wider still, sir."

"Well, Mr. Mould, after what you have already told me, I do not think anything could shock me; but pray go on, unless it is anything I ought not to hear."

"Oh, no, sir, there's no harm in it, when once you gets to know what widows really is, sir, you won't be shocked at nothing, sir. Well sir, after the funeral, as we was leaving the corpse in his last resting place, and I was walking before her to lead the way back to the first mourning coach, who should come up to her but Captain P."

"Who is Captain P., Mr. Mould?"

"Why, sir, you must be a stranger to Berkshire not to know Captain P. He be the handsomest, go-a-headest young man in the whole county, and lots of money he has, too, sir. Says Capt. P. to Lady B., for I was all ears for to hear what they was saying, 'Oh, Lady B.,' says he quite soft like, 'if only I dared to hope.' That's what he said, sir, same as Sir George. I suppose it is the right way of putting it in the upper circles of society; perhaps you knows, sir."

"No, really, Mr. Mould, I cannot say I do; but what answer did Lady B. give him? You won't mind telling me, I dare say."

"'Hush,' says she, quick like, same as before, 'not to-day of all days, Capt. P.; besides—besides—I have already promised Sir George, and he must come first you see—but, I think, perhaps, Capt. P., in five years' time, or perhaps in three, if you do not mind waiting that time for me,' says she; and with that he bows very low, and hands her into the carriage, and I shut the door, and went back to see the corpse made all comfortable-like in his last resting place."

"Mr. Mould, Mr. Mould, I cannot bear any more. Ah, here comes the train! I must try to forget all you've told me. Good night."

"Good night to you, sir. Lord bless you, sir, when you're as old as I am, you'll know what widows is, sir."

Ten years later on I met my old chief in Lincolns Inn, and ventured to ask him if Lady B. was still lady of the manor, and he the steward.

"I am still the steward, but Lady B. is now Mrs. P., the wife of Major P.; he was

the most dashing man in the county when he married her, the year after Sir George B. died, who married her soon after her first husband's death. But I hear the Major is now a martyr to gout, and there is no knowing how long he may live. He owns the beautiful estate just adjoining the old Manor Park; the whole forms the most perfect property in the county of Berkshire."

"And is the Major's wife as beautiful as ever?"

"The handsomest lady in the whole county, Mr. Borret. Her portrait was in the Royal

Academy last year, and was considered a masterpiece of portrait painting. If the Major should die, one cannot, of course, say what may happen; but as long as she is lady of the manor I shall hope to be steward."

"And are you yourself still as determined an old bachelor as ever, sir?" I asked.

"Yes, verily and by—I was going to say my catechism; I mean to remain a bachelor, by the help of Providence, until the time comes for me to render the account of all my stewardships."

THE LAW OF THE CHINAMAN.

Though a man with a sharp sword should cut one's body bit by bit, let no angry thought arise, let the mouth speak no ill word.—FO-SHO-HING TSAN-KING.

SO natural has it become, says the *Law Times*, to treat everything connected with the Celestial Empire as either comic or semi-barbaric, that the denizen of Pump Court will start and rub his eyes when he hears from the latest authority that, in many respects, the Chinese penal code is superior to the English system. Mr. Alabaster's work comes as a most refreshing change from the too often dry and dreary pages which the legal reviewer is commended to scan from year's end to year's end. A book which transports one from the musty cloisters of statute and case law into an atmosphere of quaint customs and breezy anecdote, shot through and through with the golden threads of even justice, demands a broader treatment than the heading "Law Library" would warrant.

Legal practitioners are few and far between in China; in fact, it can hardly be said that there are either counsel or solicitors. A semi-official class exists who solve the more difficult forensic problems; they are called *shih i*. The *tai shu* must be a brave set of men; they qualify for drawing up petitions,

but the work is fraught with danger. One poor old fellow of seventy got three years' transportation for drawing up five petitions. Advocacy is equally risky; a scholar was sentenced to two years' imprisonment and eighty blows from the heavy bamboo for trying to reduce a criminal's offense from murder to manslaughter. Chinese apathy when some villainy is being done is largely due to fear of the law, which says that "persons must not interfere unless they have a right to do so by reason of relationship."

The code is an effectual check on judicial and forensic genius. The duties of the Judge are confined to determining the facts and the article of the code they agree with. Thus the sentence is fixed without variation to begin with, and any *circumstances attenuantes* are considered by the Judiciary Board at Peking, to whom the great majority of capital sentences are referred for revision every autumn. The list of those who should by right be executed is then submitted to the Emperor, who decrees their fate in a curious way. The names are written on a large sheet of paper, those being considered less guilty being placed near the corners or the centre. The Emperor then draws a vermillion

¹ Notes and commentaries on Chinese Criminal Law. By Ernest Alabaster, Barrister at Law, London, Luzac & Co.

circle on the paper, and those whose names are traversed by it are doomed. The rest go forward to the next list, and if they are lucky enough to escape the red for three years they are free.

People who growl at having relations would not survive a week in China. There a man is blessed with ramifications of relations in every direction and when he wants to hit his enemy over the head he has to stop and consider how it will affect this vast army of kindred if the law descends upon him. He has at least half a dozen mothers to begin with; there is his father's chief wife, the wife who bore him, the other wives (if any), the mother who brought him up, the step-mother, the wife of the relative whose heir he becomes, the mother-in-law, and so on. In the five degrees of relationship there can be altogether 100 souls.

Here is a curious instance of the way the system works in the case of a parent. A father was bribed to hush up the murder of a son. Another son revealing it, the father was excused, and the wretched youth heavily sentenced for bringing his father into danger of the law. Again, a woman, tired with reaping, slipped and caused her father-in-law to hurt himself. By special favour she got off with a fine in lieu of a bamboozing and three years' transportation. It is interesting to know that to kill one's mother-in-law involves a heavier penalty than to kill one's wife—"a possibly wise provision" sententiously remarks our commentator.

The relation of master and pupil is a very important one. Thus a Chinese Squeers may not whack his scholars to death, nor is it right to knock a clumsy apprentice over among the pots and pans, and even a priest may not cast a stone at a sniggering disciple. The apprentice is free at the end of his term, but the other two relationships endure unto the end of mortal existence; possibly further, since the arm of Chinese law extends into the land of shades as we shall see later.

A lunatic may become a great nuisance to his numerous relatives by involving them in his vagaries, nor does his irresponsible condition always help him. If he drowns himself in the sacred waters of the Palace Lake or the Imperial City moat, his relatives will catch it, unless it can be proved that he fell in by accident. Lunacy is no defense, although the circumstances are carefully considered and the sentence is mitigated in proportion; but the curious effect of relationship is shown in the following case: A son trying to prevent a lunatic brother from beating his father, accidentally killed the latter. The lunatic suffered the "lingering death" (slicing to pieces), and the other decapitation subject to His Majesty's pleasure. Guns kept handy for burglars may lead to trouble. Li Yung-ch'ing mistook his father for a night-robber and shot him: result, decapitation.

Suicides have given rise to most curious complications. A man sent his wife (manlike) to dun an elder brother for a debt. The work was thoroughly done; failing with tears and torrential abuse, she passed on to beating her head against the wall and charging him with doing it, thence to smashing his best china and strangling his children. Thereafter entered friends of the brother, who continued the process by cooking and eating his goldfish and washing them down with his solitary jar of wine. Whereat the debtor went forth and hanged himself, and the brother, being held responsible, was sentenced to strangulation. The wife escaped with a fine, but the friends paid two hundred blows apiece for their impromptu meal.

A thief who hid under a lady's couch to avoid pursuit, so frightened the occupant that she promptly killed herself, for which the thief was transported for three years. The lady, as a reward for her nobility of mind, received a posthumous tablet. If a wife assists her husband to cut his throat, the law will send her after him with-

out delay ; and the unwary scion who is even hoodwinked into helping the dread mother-in-law to end her days will incur the extreme penalty of slicing to pieces. "A life for a life" is a stern principle in Chinese law, and if a father murders a whole family his innocent children may have to suffer. In grave cases of treason male relations are either decapitated or mutilated to prevent continuance of the family.

It is interesting to learn that biting to death and burying alive are by no means the worst forms of murder ; in fact, one solicitous husband who cheerfully buried his wife alive at her request because she suffered so with her corns—no doubt an aggravated complaint among Celestials—received a very mild sentence. Even a Celestial Bluebeard who drove three wives to suicide, burnt a fourth with red hot irons, and cut a steak from a fifth to eat with his wine, was legally only liable to strangulation subject to revision ; so a special decree had to be issued for his immediate decapitation. Why not slicing to pieces, we wonder.

A good deal depends upon the kind of weapon used. A sharp instrument is worse than a ten-pound club, but "eye-outscooping," as Æschylus terms it, takes precedence of either. To butt your enemy on the nose is an assault only, but it may involve bamboozing and a year's hard labour.

Punishments to fit the crimes are very carefully arranged and classified. The severest capital punishment is slicing to pieces and extinction of the family. It is called "lingering death," but in reality the third or fourth cut is made fatal. The punishment is really aimed at the offender's existence in the spirit world. In common with all Orientals, the Chinese believe that they inhabit an ethereal body after death, and that this tenement can be injured by a sharp instrument. Hence the chopping up of the physical body so injures the *doppel-gänger* that he is unrecognizable even beyond the grave. This is a subtle refinement our crimi-

nal law has not yet attained to. The offender does not escape his posthumous disgrace by committing suicide ; his corpse is sliced up just the same. When a merciful brother buried a matricide alive to evade the penalty, the court had him dug up and sliced.

The feelings of departed spirits are also considered. Mrs. Wang slew a virtuous son who expressed his disapproval of her improper tastes. Clearly the son could not wish his mother to be hanged, and so, out of respect for his feelings she was merely sent to Tartar slavery.

It is further believed that the departed spirits subsist on the aroma of wine and pork offered by the sorrowing relatives. Hence, in order to stamp out a very pernicious entity, not only is the body sliced, but the relations, whose duty it is to sustain the spirit's life with these offerings, are executed, or, if under age, emasculated.

As a torture : the only legal instruments are a kind of "Boot" and a finger screw ; their use is strictly regulated. Some illegal tortures are occasionally used as deterrents in cases of exceptional atrocity.

In spite of the evils of the "responsible" system, the complications and injustices caused by fine distinctions, relationship, etc., and some undoubted absurdities, there is much to admire in the system as a whole.

Mr. Alabaster declares that the Code is "infinitely more exact and satisfactory than our own system, and very far from being the barbarous, cruel abomination it is generally supposed to be ;" it is inherently consistent, and capital sentences are, in the majority of cases commuted by the process of revision described. The cases quoted will certainly not convey the impression of even-handed justice, but some of the worst in the book have purposely been selected. It is in the very effort to combine law and justice that the immense number of distinctions are drawn which in many cases defeat the end in view. It is in the broad results, however, that the value of a system is proved, and we

have it definitely stated in this work that "there is far greater security for life and property in the majority of Chinese towns and villages than in our metropolis."

Thus we can afford to respect and even learn from Chinese law. An "evolved pro-

duction of 4,000 years," it has developed slowly and steadily to suit the growing needs of the people, and it is remarkably similar to Roman law, on which our own system is based.

TRUTH IS STRANGER THAN FICTION.

THE GREAT SMYTH CASE.

COMPILED FROM VARIOUS SOURCES BY LAWRENCE IRWELL.

THE celebrated Tichborne case is probably familiar to most readers of *The Green Bag*; but the Stapleton Estates case, which resembled it in three important particulars, is by no means so well known. Both undertakings had the same object in view; both had an untimely end, and the chief actor in each met with a well-merited punishment. The great Smyth case occupied the attention of Mr. Justice Coleridge (the Lord Coleridge recently deceased) and a special jury at the Gloucester (England) assizes from the 8th to the 11th of August, in the year 1853, and from the strange evidence tendered, and the extraordinary termination of the proceedings, the trial will always be regarded as one of the most remarkable in English legal history. The action was to recover possession of the Stapleton estates, worth more than £20,000 a year, and was brought by a man styling himself "Sir Richard Hugh Smyth, Baronet," against the person in possession of the property, whose name I do not know. (Let me here state that the following account of this extraordinary trial has been derived from so many different sources, that I am only able to vouch for the accuracy of the important facts, and not for the details, although I believe that even the minor points are correctly stated.)

In order that my readers may grasp the gist of the case, I commence by giving a

brief outline of the Smyth family, showing the grounds upon which the plaintiff sought to establish his claim.

Sir Thomas Smyth, of Stapleton, Gloucestershire, died in 1800, possessed of the Stapleton estates. He left four children, Hugh Smyth, John Smyth, and two daughters, one of whom married a Mr. Upton and the other a Colonel Way.

Sir Thomas Smyth devised the property to his eldest son Hugh for life, and if he died childless, then to John, upon the same terms, and if he also died without children, then to the two daughters successively, and their children. John died without leaving a family, and Hugh, although known to have been married twice, was also believed to have left no issue; the property, therefore, went to the child of one of Mr. Thomas Smyth's daughters under the terms of the above-named will. Suddenly, however, and, of course, unexpectedly, the owner was surprised to find his title challenged, by the plaintiff, who claimed to be the son of Hugh Smyth, and who sought to establish his right on the ground that Hugh Smyth was married to his mother—a Miss Vandeburgh—in Ireland, in 1796.

If this story were true, the plaintiff was undoubtedly the person to whom the estate belonged.

The story related in court amounted to

this : Hugh Smyth was married on the 19th of May, 1796, to Jane Vandenburg, a daughter of Count Vandenburg, at the residence of a Mrs. Bernard, afterwards the Countess of Brandon. The great Irish rebellion at just that time breaking out, the Countess of Brandon and two of her friends, the Marchioness of Bath and Mrs. Jane Smyth, came to England and went to reside at number 1, Royal Crescent, Bath (Somersetshire). For some unexplained reason, Mrs. Smyth left her aristocratic acquaintances, and removed to Warminster, to the cottage of a poor carpenter named Provis, where, after the birth of the plaintiff, she died, the child being left in the care of a woman named Lydia Reed. During early childhood, the boy was sent to local schools, and afterwards to Winchester College, where the payments on his behalf were made by Sir Hugh Smyth's butler, a man named Grace. Now, according to the plaintiff's story, Grace falsely reported to Sir Hugh that his son (the plaintiff) died in 1814. At about that time the Marchioness of Bath gave the plaintiff £1,500, with which he started to travel, and remained on the European continent, without visiting England for the twelve years from 1814 to 1826. When the Marchioness handed him the money, she told him that her steward, Mr. Davis, at Warminster, had a quantity of property belonging to his (the plaintiff's) mother, consisting of her Bible, pictures and jewelry, which might be of great use to him. On his return to England he found that his father was dead, and his uncle, Sir John Smyth, was in possession of the family estates ; but, strange to say, the plaintiff, although without means, did not think it worth while to make himself known, or claim his birthright ; on the contrary, he travelled about the country, lecturing on education, under the name of Dr. Smith. In those days in England anybody who liked might call himself "doctor," without being ridiculed, much as it is in some of the States at the

present time. This point must be borne in mind, as according to the plaintiff's own admission, Smith was an assumed name, and a man who has deliberately passed for a long period under one assumed name may not be very particular about using another. However that might be, one point was clear, viz : that, although he was without means, he did not ask for the £20,000 per annum to which, according to his own story, he was legally entitled. The lecturing business continued until 1835, and while the plaintiff was continually travelling about the country, he neither went to see his uncle, nor to secure the articles in the possession of Mr. Davis at Warminster.

Ascertaining, in 1838, that Mr. Davis was dead, he went and saw Mr. Provis, in whose house he was born. The following is the plaintiff's own description of their last interview : "I then saw old Mr. Provis, who was living at Frome (Somersetshire). I had some words with him for obstinately refusing to give me any information concerning my mother. He said he would say nothing further. I was taken away from his house at so early a period of life that he never troubled himself any further. I had seen him several times before. This was the last interview. He seemed to draw back. I used some hard expressions, and he struck me with his stick on the head. I told him it was the last time I should call upon him. He had struck me and had no right to do so. I put him down in a chair. The words I used were : 'How dare you strike me?' I was going away when he called me back, took me upstairs to his bedroom, opened his bureau, and gave me the Bible and the jewelry. A large picture, said to be that of my father, hung in the room below. He also asked me to pledge my word that I would follow his directions. I assured him that I would. He then gave into my hands a bundle of papers, sealed up, with directions to take them to Mr. Phelps, a solicitor, at Warminster. I

then left him and never saw him more. I brought the Bible and jewelry away without opening them."

From this interview with old Provis in 1838 till 1852, the plaintiff made a precarious livelihood by lecturing and what he named "teaching," and it seemed then to have occurred to him that the time had arrived when he should claim his property and title, and to accomplish this end the action was brought.

I have been unable to ascertain the name of the plaintiff's counsel, but Sir Frederick Thesiger, afterwards Lord Chancellor Chelmsford, appeared as the leading counsel for the defendant.

At the trial the plaintiff gave evidence as stated above, and also produced two remarkable documents, one dated the 27th of January, 1822, the other the 10th of September, 1823, both purporting to have been signed by Sir Hugh Smyth, and sealed with his seal. The object of these documents was to prove that the plaintiff really was the rightful heir. He also produced in court an old Bible which he swore was the identical one handed to him by Mr. Provis at the last interview in the year 1838. It had on the title page the name "John S. Vandenburg," and also contained the certificates of Mrs. Smyth's marriage in 1796, and the plaintiff's baptism in 1797. He explained that the Bible had been his maternal grandfather's, and that his mother's maiden name was "Vandenburg." He also produced a miniature portrait of his mother, four gold rings, and two brooches, also supposed to have been her property. One ring was engraved with the initials "J. B.," suggested to be those of Jane Bernard, afterwards Countess of Brandon, and one of the brooches with the words "Jane Godkin." This was the jewelry sworn by the plaintiff to have been handed to him by old Provis in 1838. The deeds of 1822 and 1823, and the certificates of marriage and baptism, were witnessed by several persons, all of whom were dead, and the first day of the

trial was taken up in proving the authenticity of the signatures. The evidence, as a whole, seemed to be somewhat in the plaintiff's favor. How he must have chuckled as he heard one reputable witness after another innocently substantiate his awful lies! When he had completed his extraordinary story, and had produced the above-mentioned articles in support of it, Sir Frederick Thesiger commenced his cross-examination, the object of which was to prove that the plaintiff was the son of old Provis, the carpenter, and that his claim was a fraud from the beginning to the end, all the articles produced in support of it having been purchased by him for the purpose of being palmed off as family relics. The plaintiff stated that he had written a letter to Lady Caroline Thynne, in which he stated that he had in his possession a mourning ring with the inscription, "In memory of Jane, wife of Hugh Smyth, Esquire; married May, 1796; died February, 1797."

Sir Frederick Thesiger: "Where is that ring?"

Plaintiff: "In the box."

"Find it, sir."

The plaintiff opened a ring box, but it was empty, the ring having disappeared.

"When did you see it last?" asked Sir Frederick.

"I do not remember," was the plaintiff's reply; but upon being pressed, he said that he had seen it last at the office of his solicitor.

Sir Frederick then tried the witness upon the question of education. He spelt "vicissitudes" with one "s;" "Lord Knox," "Nox;" "rapid" with two "p's;" "whom," "whome." The most important part of the spelling test, however, was when he was asked to spell "set aside," which he gave as "sett asside," this being the way in which the same words were spelt in the document of the 10th of September, 1823, which the plaintiff alleged was written by Sir Hugh Smyth. A curious incident, indeed, that two persons, with an in-

terval of thirty years intervening, should both spell two words in exactly the same way, and both be wrong!

The picture, which was alleged to have been that of Sir Hugh Smyth, which was hanging up at Provis's house, was produced in court and carefully examined, and it turned out that it had always been understood to be that of John Provis, the old carpenter's son.

The plaintiff was now asked if he was married at St. Michael's Church, Bath, on the 9th of October, 1814, to Mary Ann Whittick, in the name of Thomas Provis. This he positively denied. Some questions were then put to him respecting the seals on the alleged deeds of 1822 and 1823, but nothing of any great importance was elicited.

How the case might have ended in the ordinary course of events, nobody can tell, but a very unusual incident happened on the third day of the trial. With the single exception of the sudden collapse of the Osborne-Hargreaves libel suit, when the Messrs. Benjamin's letter was received by the Judge, it has probably no parallel in legal history.

It will be recollected that the plaintiff in the action had sworn that among other things, he had received from old Provis, in 1838, a brooch, with the words "Jane Godkin" engraved upon it. On the last day of the trial, a telegram was handed to Sir Frederick Thesiger. After reading it, and still holding the paper in his hand, addressing the Judge, he said: "My Lord, I have just received a telegram from London of the greatest importance;" then, turning to the plaintiff, who was on the witness-stand (called in England "the witness box"), he said: "Did you on the 19th of January last, apply to a person at 361 Oxford Street, London, to engrave a ring with the Brandon crest and a brooch with the words 'Jane Godkin'?"

There was a breathless silence in court, and all eyes were fixed upon the plaintiff. He was, in a moment, an altered man. All his assurance had vanished, and, in a faltering voice, he answered, "I did, sir."

This admission brought the trial to a close, and the plaintiff stood before the world as a self-convicted impostor.

The plaintiff's counsel, of course, withdrew from the case; the Judge ordered the plaintiff's arrest, and later in the day he was charged before a magistrate with forgery, and committed for trial. Thus ended one of the boldest tricks ever attempted to defraud a family of its property. The reader may perhaps be curious to hear the sequel to this remarkable trial.

At the Gloucester Assizes, in April, 1854, the plaintiff in the above-mentioned case was charged with forging the document dated 1823. The trial took place before Mr. Russell Gurney, who presided as Judge, Mr. Justice Talfourd having suddenly died on circuit in the midst of his judicial duties.

Mr. Moring, a seal engraver, of Holborn, London, was called, and stated that in December, 1852, the prisoner employed him to engrave a seal from a pattern with which he furnished him. The correct motto was "Qui Capit Capitur," but by a mistake the words were engraved "Qui Capit Capitor," the "o" in the last word being an error for "u." That this was the seal which was used by the prisoner for sealing some of the documents produced in evidence by him, was clear, as the same mistake in spelling appeared on the wax seal. Mr. Moring further stated that there had been an alteration in the method of engraving seals within the previous four or five years, and the seals upon the documents produced by the prisoner, and which he alleged had been sealed thirty years before, had been sealed with a seal made in the latest style. It further transpired that the prisoner had had the audacity to call upon Mr. Moring and ask him not to give any information about the engraving of the seal. Rogues so herd with rogues that they do not know an honest man when they see one. It was evidently thus with this defendant.

The next witness was a Mr. Cox, a jeweller of 361 Oxford street. It was from

this gentleman that the telegram came which brought the civil action to such an abrupt termination. Having read in the newspapers that the plaintiff in the Smyth case had referred to a mourning ring, and had sworn that it had the inscription, "In memory of Jane, wife of Hugh Smyth, Esquire, married May, 1796; died February, 1797," Mr. Cox thought it his duty to communicate with the legal advisers of the Smyth family, as he recollected engraving a ring, "Mary, wife of Sir Hugh Smyth; m. 1796; d. 1797." Had this ring been produced in court, it would, of course, have at once stamped the case as a fraud, in consequence of the substitution of the name "Mary" for "Jane," and describing Hugh Smyth as "Sir" at a time when his father was still alive. It can easily be understood why this ring was not forthcoming at the trial. Mr. Cox had also engraved for the defendant the words on the brooch, "Jane Godkin." The brooch, like the ring, was therefore a "relic" of recent date, manufactured for the purpose of imposing upon the Judge and misleading the jury. But perhaps the most crushing piece of evidence related to the old family Bible, of which the prisoner had made so much, and which he had positively sworn was taken by old Provis out of his bureau in his bedroom and handed to him (the defendant) in 1838. It appeared from the evidence of a bookseller, whose place of business was next door to Mr. Moring, in Holborn, that he had purchased from a Mr. Vandemburgh an old Bible, and that the prisoner had bought it of him in February, 1853, only six months before the trial, and Mr. Vandemburgh proved that the Bible itself had belonged to his deceased father, and that the words on the title page, "John S. Vandemburgh," were in his father's handwriting.

As to the prisoner's identity. His sister was called, and proved that he was her brother, Thomas Provis, the son of old Provis, the carpenter, and that he was married in her presence to Mary Ann Whittick at St. Michael's Church, Bath, in 1814, and that the portrait which the prisoner had declared to be that of Sir Hugh Smyth, hung for years in her father's house, and was, in reality, a likeness of her brother John.

Other evidence was produced to prove that the documents of 1822 and 1823 could not possibly be genuine, as both the parchment and the ink showed that they were not of the age alleged.

The defendant had made a great parade of the Vandemburgh Bible; but, evidently to his horror, another Bible was now produced, in which was an entry of his marriage with Mary Ann Whittick *in his own handwriting*. The boldness of some impostors almost passes credulity. This one had actually sworn at the trial of the civil action, that such a marriage had not taken place!

The prisoner was not represented by counsel, but conducted his own defense, cross-examining the witnesses for the prosecution with some ability. The statement that the previous trial had cost the Smyth family nearly seven thousand pounds seemed to cause him much pleasure. He made a long speech in his defense, and raised what he evidently imagined was a novel question of law, viz: that a man could not be convicted of forging the name of a deceased person. The Judge ruled against him upon that point, and the jury, after a few minutes' deliberation, found him guilty, and he was sentenced to twenty years' transportation—that system of punishment for long term criminals being then in vogue.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

FACETIÆ.

A LONDON lawyer had been examining a mine in Cornwall, and while coming up the shaft saw a friend, who was a venerable clergyman, standing at the top watching his progress. "Doctor," said the lawyer, "as you know all things from the surface to the centre, pray can you tell me this: How far is this pit from the other one in the infernal regions?" "Well, I can't tell you the exact distance in miles," said the clergyman, "but, if you let go your hold, you'll be there in a minute."

GENERAL Benjamin F. Tracy, ex-Secretary of the Navy, was once trying a case in the City Court which involved the liability of a provision dealer for unwholesome pork. The point at issue turned upon trichinosis, and the word was bandied about by counsel and scientific experts. The most interested auditor was an old court officer who listened to all the arguments, especially to those of the General.

"Oh, but that was an instructive spache, General. Oi knew that pigs were unhealthy animals, but I never knew they had tricky noses before."

"I'd like to marry a lawyer."—"What for, Arabella?"—"He wouldn't argue with me."—"How do you know?"—"Lawyers never argue without a fee in sight."

JUDGE: "Prisoner at the bar, have you anything further to state in your defence?"

PRISONER: "No, your honor, I only ask you to deal with me as you would with yourself if you were in my place."

ONE day the President of the French court, gathering the votes of the Judges, and coming to ask that of a Judge who had been asleep, the

latter starting out of his doze, and not yet quite awake, answered that his opinion was that "the man should be beheaded." "But," said the President, "the case before us is about a meadow." "Let it be mowed then," was the sleepy rejoinder.

NOTES.

UNFORTUNATELY the client's estimate of the attorney too often depends upon the result of the suit. An able and conscientious lawyer once tried a case with his usual care and ability. Everything pointed to a verdict in his favor, and as the jury retired, he inquired of his client, "Are you satisfied?"

"Perfectly," was the reply. "Daniel Webster himself could not have done better."

The jury returned a verdict for the other side. Not many days after the disappointed litigant met a friend who inquired, "What was the cause of your losing your case the other day?"

"Oh! a natural one," he replied. "I had a fool for a lawyer."

THE following is an accurate and exact copy of a letter received at the pension office in Knoxville, Tenn. It tells its own tale of woe, and it is to be hoped brought the money held back by the Government:

VICKSBURG MISS MAY 4 1900

GOVERNMENT:

I still inform you of the Remainder of my pension 1899 December 4 \$12 dol please send me it No 117034 I ought had my money the way I was done

Eliza McGill

Government it is hard for me to be percutted and flicted to death in the of name of the Government and cant get my money it is hard any treatment of the Government to a poor widow woman that is Been Murdered and even dubteem on in December and no money to pay doctor bills to waite on me and I am kept out of my

money I did and I am deaf in my Ears by my head being Bursted open and broked and nothing for being flicted like I am I claim damage I do Government I have tryed to help myself and I am Broked down by the name of Government Eliza McGill.

THE remarkable role played by the oath in the mental and social make-up of the Moham-medan, as also its importance in legal processes of the Orient, is known to all Eastern travelers. In the *Mittheilungen*, published by the German Palestine Society, Bruno Hentschel reports a singular incident that recently occurred under his own eyes in Jerusalem, and that throws a characteristic light on the processes of Turkish law and on the importance attached to the oath by the Moslem. The event is the following:

At the Bab Chan ex-Zet, near the Hospiz of the St. John's Order in Jerusalem, there lives a Moslem, originally from Damascus, whose only son, in play with his companions, had begun to quarrel with them. The latter made complaint to the father, who on his part took a very serious view of the matter and in the presence of fellow Mohammedans cried out aloud: "*Allihi ittalak min et-talate lesim atbatak*," i. e. "If I do not kill thee, I will divorce myself three times from my wife." As he had but one wife, he, by his oath, would have been compelled to divorce her and marry twice again and divorce these wives also. After he had spoken these words, he began to think of the trouble he had thereby brought upon himself and his family. As this son was the only child left of seven children born to him and his wife, he regarded it as out of the question to kill the boy. And yet he knew what would be the consequences if he did not keep his oath; he would have been ostracized by his fellow believers.

In his despair he applied to a Moslem theologian and asked for his advice. The reply stated that it would not be absolutely necessary for him to kill the boy, but that it would be necessary for him to show that he was ready to carry out the oath by sharpening a butcher knife in the presence of his son and with the knife to make a cut into the neck sufficient to cause the blood to flow. This the unfortunate father undertook to do, and when the knife was put upon the boy's neck, the latter through fear

fell into spasms that ended his life on the next day. The father was cast into prison, but in consequence of his qualms of conscience became seriously sick in three days and was released. He was never re-arrested and still lives in Jerusalem.

It was Darwin who discovered that the dog howled at night only when the moon was shining, because then images of former days were recalled to mind. It was also this same scientist, who said that the reason why a dog would turn around on a rug several times, before reclining, was due to instinct, as in his wild state, this was necessary to tramp down the weeds on the prairie. With this in mind no doubt our Iowa courts have just decided a case of *Van Bergen v. Eulberg*. The following is the opinion by Ladd: The suit was for damages resulting from the bite of a dog. "That the injured girl threw sticks and stones at the dog several months before she was bitten furnished no excuse. A dog has no right to brood over its wrongs, and remember in malice. The only defence available to the dog's master, is the doing of the unlawful act at the time of the attack, by the person injured." With such a state of facts and such a decision before one it will be difficult to own a dog in Iowa, where he is taxed and has further and divers other faults and conditions to comply with. The learned judge may be superior to most of us, when it comes to technical law, but on matter or this kind we believe he speaks, not as an expert, but ex-cathedra. How does he surmise that the dog cannot brood over his wrongs, i. e., if he has any? Why cannot the dog treasure up malice? Try him a few times and see if he does not remember a kindness, and never forgets a wrong or an injury. It is evident that the judge has had no dealings with dogs, and he may come to be sorry some time that he has not.

Not long ago a Norwegian was sued for shooting a dog, which he had tormented a few times, and when the big bull dog came at him with mouth open and teeth set, the son of Thor thought, "here to save myself I must do short work," and he laid the dog out with a well directed bullet from his gun. On the trial the plaintiff's attorney suggested that it would have been better and more humane to have used the

butt end of the gun and thus scared him away. He replied, saying, "I would have done dat, but de bull pup he not come at me dat way and so I tenk I better use safe end of my gun on him." This man knew the dog as he is, not as one would wish to have him, and he came out safe, while one, a theorist and a dreamer, who imagines that a dog does not know enough to brood over his wrongs, and carries no malice in his heart, will find to his sorrow the seat gone from his trousers before he knows it. Never take any chances with a dog and never go into Iowa courts with a dog case, for you will not be permitted to prove that he can treasure up wrongs, nor remember in malice.

It is not generally known that the genial author of "Bab Ballads" and the collaborator with Sir Arthur Sullivan in the production of many charming comic operas enjoys the dignity of being a police court judge. But such is the fact. In the stuffy, ill-ventilated police court at Edgeware, England, W. S. Gilbert, J. P., and playwright, occasionally presides, and metes out the justice of the land to evil-doers.

LITERARY NOTES.

Two of the freshest and most important of recent articles on China, namely, Mr. Gundry's account of "The Last Palace Intrigue at Peking" and Mr. Douglas's hopeful view of "The Intellectual Awakening of China" will be found in *THE LIVING AGE*: Mr. Gundry's article in the number for July 7 and Mr. Douglas's in the number for July 21.

THE INTERNATIONAL MONTHLY for July will be read with pleasure. Prof. Robinson, in an article criticising methods of writing history, takes occasion to introduce examples of the treatment which should be accorded striking events in history, as, for instance, the policy of the church in the times before and during the Reformation. Prof. Wilson writes on the advance in the science of biology and describes the wonderful experiments in the lower forms of life which have shown that fertilization of the female is not dependent upon the male in all cases, and which throw light upon the influence of heredity and the question of sex. Dr. Edson has a paper on the bubonic plague, which tells the history of that terrible scourge with which we are now threatened, and its development and methods of prevention; there is only one chance in twenty of a

cure. Mr. Payne writes interestingly on the subject of American literary criticism and critics; and the famous French thinker, Th. Ribot, continues his article on the creative imagination, devoting this installment to the question of invention and inspiration, two topics of especial interest to Americans who take the lead in invention.

EX-PRESIDENT CLEVELAND opens the July *Atlantic* with his discussion of The Independence of the Executive. He describes the intense pressure for office at the beginning of his first term, and follows with a graphic account—interspersed with characteristically pungent comments—of the political controversy that ensued in and with the Senate from the attempt of that body to control the removals and appointments made by him, by reviving against him the old-time Tenure of Office Act of 1869, which had been practically a dead letter for many years. The struggle was long and bitter; in the end the President maintained his ground, the Senate gradually receded, and the contest subsided. A few months later the law itself was repealed, and "thus was an unpleasant controversy happily followed by an expurgation of the last vestige of statutory sanction to an encroachment upon constitutional, executive prerogatives, and thus was a time-honored interpretation of the Constitution restored to us. The President, freed from the Senate's claim of tutelage, became again the independent agent of the people, representing a coördinate branch of their Government, charged with responsibilities which, under his oath, he ought not to avoid or share."

EXCELLENT character sketches of both the Republican and Democratic Presidential Nominees will be found in the *American Monthly Review of Reviews* for July. Dr. Charles B. Spahr writes of Mr. Bryan and the principles that he represents, while a friend of President McKinley tells of his personal traits and the record made by his administration.

THE timeliness of the July *Century* is due in large measure to its literary and pictorial treatment of the present Mecca of holiday-makers. Eight full-page drawings by Castaigne illustrate the Exposition, and four other full-page and several smaller drawings from the same pencil form a pictorial commentary on Richard Whiting's paper on "Artistic Paris." Having begun life as an artist, Mr. Whiting writes with keen appreciation of his subject, in a style, moreover, that has many of the qualities distinctive of the French man-of-letters. In the matter of full-page pictures, *The Century* probably makes a record for itself this month, the

twelve already specified being less than half the total number. One of the other fourteen is Thomas Cole's wood-engraving from Constable's "The Hay-Wain" and six of them are found, with many smaller ones, in the current instalment of Morley's "Cromwell." In an article on "The Commercial Ascendancy of the United States," the Hon. Carroll D. Wright, Commissioner of Labor, hazards the guess that in exports for the year ending March 31 last, America has at last surpassed her greatest rival, England.

RICHARD HARDING DAVIS's "The Relief of Ladysmith" in the July *Scribner's* is probably the most brilliant piece of war correspondence since his famous story of the fight at Las Guasimas. He gives a vivid impression of the ways of living, the privations, suffering, and the constant danger in the besieged city, and of the fine spirit of endurance that enabled its defenders to hold out until the last. He shows, too, how difficult it was for the advancing column under General Buller to make its way through the surrounding hills that afforded the Boers an almost impregnable natural defence, and describes the stirring scenes attending the entrance into the city of the relief column. The illustrations are from photographs of the city and of the country about.

THE July "*New Lippincott*" is primarily a summer-story number. The complete novel, called "An Anti-Climax," is a story of modern society in a swell suburb by Ellen Olney Kirk. Many remember "The Story of Margaret Kent," by the same pen, which achieved so great a success several years ago, and in this later work Mrs. Kirk bids fair to excel her earlier one. The first of five extraordinarily good short stories is notably Marion Harland's college tale "As a Dream when one Awaketh." This special graduation happens to be at Rutgers, but the incident might occur any day at any college, so it appeals to us all and is intensely interesting. "A Monk from the Ghetto," by a new writer of much originality, Martha Wolfenstein, may be considered an antithesis to Maarten Maartens's story, "The Little Christian," which appeared in "*Lippincott's*" several months ago and stirred up quite a controversy. The lifelong friendship between a Catholic priest and a Jew is the key-note of the plot. "Dambillissimus Juvenis," by Beulah Marie Dix, is a thrilling tale of Roundhead times, with a hero who found that knowledge of Latin saved his neck in time of danger. "How Willett Wooed the Widow," by Samuel Minturn Peck, is a laughable story on the subject indicated by the title, and will serve as a warning—or an example—to those who are going to do likewise. "The Giant's Golf" is a clever

skit by Henry Wallace Phillips. This is a quite new treatment of a familiar subject.

WHAT SHALL WE READ?

Everyone is asking for some reliable work on the crisis in China. About the only book yet issued on the subject is Reinsch's *World Politics* published last month by the Macmillan Company. According to a well-known American writer this gives the very best account of affairs in China he has seen. He says: "It couldn't have been better if it had been specially prepared for this crisis. The account of the present condition of the country is full, interesting and dispassionate; the report of the concessions to the Powers and their relative claims and privileges admirable. One gets a comprehensive view of the whole situation. There is a host of people who want such a book as this."

That Mrs. Steel's *Voices in the Night*¹ is a faithful picture of the condition of modern Indian life with its confused mingling of opposed civilizations, no one can doubt; but in portraying complex social conditions she has given us a rather complex and confused story. Her novel is merely a mirror in which there is no focusing of the diffused material of real life into the unity of a plot. The characters are strong and clearly drawn, and the descriptions of Indian society are vivid and convincing, but character and episode alike are blurred and confused by a mass of unnecessary details. The background is uncertain and shifting and she is unable clearly to set over against it the actors in the foreground. They fade away and become merely part of a great changing disorganized spectacle, and yet the spectacle is in itself so interesting and massive that the story, in spite of its defects, holds the attention and interest. At the beginning Mrs. Steel apologizes to the reader for attempting "to play the Chromatic Fantasia of India on a penny whistle." It would have been better if she had apologized for attempting to play it upon an orchestra too large for her control.

The author of *The Columbian and Venezuelan Republics*² had exceptional opportunities for study-

¹VOICES IN THE NIGHT, a Chromatic Fantasia. By Flora Annie Steel. The Macmillan Company, New York. 1900. Cloth. \$1.50.

²THE COLUMBIAN AND VENEZUELAN REPUBLICS with notes on other parts of Central and South America. By William L. Scruggs, late Envoy Extraordinary and Minister Plenipotentiary of the United States to Columbia and Venezuela. With maps and illustrations. 8vo. \$2.50.

ing these countries and their people. He describes their climatic conditions, and many of the places which have been considered unhealthy by those who are ignorant of the facts he finds the reverse. His experience of twenty-five years has led him to know exactly those localities which are to be avoided by strangers. The magnificent mountain scenery of the Magdalena Valley and the gorgeous tropical scenery and luxuriant vegetable life are described at length. The great difficulties of transportation are dwelt upon, and he points out the need of better conditions, which would lead to the development of the magnificent resources of the countries. The volume contains chapters on the Agricultural Products of Venezuela, on the Guayana Boundary Question, the Isthmus of Panama, and Panama Canal projects, the Rights and Duties of Foreign Residents in South America, the Monroe Doctrine, the Venezuelan Arbitration Award of 1869, etc. The book should be invaluable to a person intending to travel or settle in South or Central America, for it contains much practical advice upon the best methods of dealing with the native population and the best parts of the country in which to settle.

In *As the Light Led*¹ Mr. Baskett gives us a striking picture of American life in rural Missouri during the heated controversy between immersionists and believers in infant baptism which influenced social and even political conditions during the late "Sixties." The story is one of unusual interest, the characters are strongly drawn and the book as a whole is one which will deeply impress the reader. It has already passed through several editions.

The Macmillan Company have just issued a work on *Historical Jurisprudence* by Guy Carleton Lee of the historical department of the Johns Hopkins University. It is intended to serve as an introduction to the systematic study of the growth of law. The contributions of each race to the science of jurisprudence are traced from the earliest records that have come to light in the valleys of the Euphrates, the Tigris and the Nile. The contributions to the science of law made by each people are clearly traced, not merely as laws, but as fundamental components of national life. Law is treated from its historic, social and economic standpoint, and it is shown that a nation's law must be studied if its progress and status would be understood. The author has based his work on original research. The contract-tablets, the papyri, the monuments and ancient records have been the foundations of the volume,

¹ AS THE LIGHT LED. By James Newton Baskett. The Macmillan Co., New York, 1900. Cloth. \$1.50.

and while several hundred citations enrich the volume, it is original in treatment and conception.

A number of essays from the pen of Edward Everett Hale make up a most readable volume entitled *How to Do It: How to Live*.¹ Under various heads, such as "How to Talk," "How to Write," "How to Read," "How to Go Into Society," etc. Mr. Hale gives much valuable advice, with a goodly bit of satire and amusing comment interspersed. The book is one for thoughtful readers, and ought to do a great deal of good, and at the same time it is a book from which the seeker for entertainment will derive real pleasure.

NEW BOOKS FOR LAWYERS.

AMERICAN STATE REPORTS, Vol. 72, containing the cases of general value and authority decided in the courts of last resort of the several States and Territories. Selected, reported and annotated by A. C. FREEMAN. Bancroft-Whitney Co., San Francisco, 1900. Law sheep. \$4.00.

AMERICAN BANKRUPTCY REPORTS, ANNOTATED, Vol. III., reporting the bankruptcy decisions and opinions in the United States of the Federal Courts, State Courts and Referees in Bankruptcy. Edited by WM. MILLER COLLIER and JAMES W. EATON. Matthew Bender, Albany, N. Y., 1900. Law sheep. \$5.00.

The practitioner who has cases in the bankruptcy courts, will find this series of reports invaluable. The selection of cases covers almost every conceivable point likely to arise, and the editors' work is eminently satisfactory.

PROBATE REPORTS ANNOTATED, VOL. IV., containing recent cases of general value decided in the courts of the several States, on points of Probate Law, with extended notes and references. By GEORGE A. CLEMENT of the New York Bar. Baker, Voorhies & Co., New York, 1900. Law sheep. \$5.50, net.

Mr. Clement is ably carrying on the work begun

¹ HOW TO DO IT, to which is added HOW TO LIVE. By Edward Everett Hale. Little, Brown & Co., Boston, 1900. Cloth. \$1.50.

by Mr. Frank S. Rice, and the publishers are to be congratulated on having found one so admirably fitted to succeed Mr. Rice in editing this important series of reports. The selection of cases displays excellent judgment, and the notes and references are thorough and exhaustive. The series is one which should find a place upon the shelves of every well equipped lawyer.

THE LAW OF BANKS AND BANKING, including acceptance, demand and notice of dishonor upon commercial paper, with an appendix containing the Federal statutes applicable to National Banks. By JOHN M. ZANE, of the Chicago Bar. T. H. Flood & Co., Chicago, 1900. Law sheep. \$6.00, *net*.

This treatise covers a subject of great importance, and supplies the legal profession with a much needed text-book. The author has performed his task in a most thorough and conscientious manner, and gives us an able exposition of the law as adjudicated up to the present time.

The right of private banking, now assuming a position of interest owing to constitutional restriction, the sections upon unauthorized banking and unlawful banking acts, notice to a bank through its officers, and especially where the officer has an interest antagonistic to the bank, liability of stockholders, especially of National Banks, to creditors, prosecution of bank officers for crimes, especially officers of National Banks, such as receiving deposits or making false returns, liability of bank upon trust funds, and liability of third parties to the bank for moneys taken by officers, are of special interest.

There is a totally new discussion of the nature of the depositor's relation to the bank and the checkholder's relation to the bank. The distinctions which involve the difficult matter of certifying checks and the release of the drawer, the right of the bank to revoke its certificate, the rights of the bank upon paying or collecting forged or altered paper are clearly explained. The true nature of a bank's contract upon taking paper for collection is indicated and the question of title to the paper deposited for collection is discussed with reference to the late decisions in Federal Courts. Savings Banks, Clearing Houses and Trust Companies, so far as they are banks, are fully treated. The perplexing matter of jurisdiction of courts over National Banks is fully explained.

The work is not only valuable to the practicing lawyer, but should be in the hands of every banker and bank official.

PRINCIPLES AND PRACTICE IN MATTERS OF, AND APPERTAINING TO, CONVEYANCING. By JOHN INDERMAUER. George Barber, London, England. Cloth. \$6.00.

This is an admirable treatise both for lawyers and students, covering thoroughly and exhaustively the principles, history and details of conveyancing. The author is one of the leading solicitors of the English Bar, and his previous works have placed him in the foremost rank of law-writers. We commend this treatise to the profession as a most excellent exposition of the law upon the subject, and students will find it a valuable aid and assistance.

THE RULES OF EVIDENCE applicable on the trial of Civil Action at Common Law and in Equity and under the Codes of Procedure. By Austin Abbott LL. D. Second Edition revised and enlarged by JOHN J. CRAWFORD, of the New York Bar. Baker, Voorhis & Co., New York, 1900. Law Sheep. \$6.50, *net*.

No work by the late Austin Abbott has achieved greater popularity than this treatise on the Law of Evidence, and this new edition will be heartily welcomed. Mr. Crawford has brought the work fully up to date by a thorough revision in connection with the statutory changes and numerous cases decided in the twenty years which have elapsed since the original work was published. Many thousands of cases have been examined, changes in the law are noticed, and several thousand new citations from all the State and Federal Courts have been added.

READINGS IN THE LAW OF REAL PROPERTY. An Elementary Collection of Authorities for Students. Selected and edited by GEORGE W. KIRCHWEY, Nash Professor of Law in Columbia University. Baker, Voorhis & Co., New York, 1900. Cloth. \$3.50, *net*.

This is an excellent book for students, bringing, as it does, within their reach the necessary material—old and new—for an understanding of the law of real property. All of the writings on real property of the great authorities—from Glanvill and Bracton down to Kent and Story—which have not become obsolete have been retained in this volume, and these have been supplemented by the contributions of modern authorities and by the principal English and American statutes, bringing the presentation of the subject down to date. The work is one worthy of adoption by all of our American Law Schools.



EDWARDS PORTER SMITH.

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EDWARDS PORTER SMITH.

By JAMES M. PERELES, JUDGE OF COUNTY COURT OF MILWAUKEE COUNTY, WIS.

EDWARDS PORTER SMITH, whose portrait graces the opposite page, was born in Burlington, Vermont, February 27, 1827. After attending the common schools, he entered college at Burlington, Vermont, where he remained two years and then he entered Union College at Schenectady, New York, from which he graduated in 1847.

The writer, whose rare privilege it has been to edit this brief sketch of his friend's life, received the following letter from Gen. Edward Fitch Bullard, now residing in the City of New York, in regard to the career of Mr. Smith in his early years :

"The writer became a resident of Waterford, N. Y., in 1838, where Edwards Porter Smith then resided; he was then about eleven years of age and a student in the Academy under Prof. Tayler Lewis, one of the most distinguished linguists in the country, who became later a professor in the New York University, and during the last years of his life a professor in the Union College at Schenectady.

"Mr. Smith afterwards entered Union College, where he was under Doctor Eliphalet Nott, one of the most distinguished teachers and college presidents of this country. Mr. Smith stood so high that he became a member of the Phi Beta Kappa Society.

"Although Mr. Smith was six years my junior, our relations were of the most intimate character until he removed to Wisconsin, about 1849.

"His father, Reuben Smith, was an austere Presbyterian minister, and through his

mother he was a lineal descendant from Jonathan Edwards, but young Smith had none of that element in his nature. He was always genial, bubbling over with good humor and ready wit, and I never heard of his having an enemy during the eleven years of our acquaintance.

"While he was a law student in my office, he gave evidence of the genius that made him famous in later years in his adopted home. After he left this State I never met him but once, which was at Beaver Dam, about 1856.

"Notwithstanding our separation, an occasional correspondence was kept up between us, and even in his business letters often a postscript would be added, gilded by some witticism."

His career in the West began in Milwaukee, where, together with the Hon. Gabriel Bouck, of Oshkosh, Wisconsin, he entered the law offices of Messrs. Finch & Lynde, and continued with that firm until the year 1849, when, upon the advice of Mr. Azahel Finch, he made Beaver Dam, Dodge County, Wisconsin, his home, and the field of his struggles and successes as a practitioner of the law. That he was thoroughly equipped to cope with the hard conditions of those pioneer days the sequel shows.

He was a young man of high moral character and splendid attainments. His principles were of the noblest and most exalted. He was a tireless student and an indefatigable worker. His knowledge of the law was prodigious, and he reveled in its intricacies; he treated it as a science and loved it as the

great and successful scientist loves his life's work. His was no ordinary mind; he was singularly bright, keen, and gifted with a facility of speech that marked him the lawyer orator. In the trial of a suit at law he united the zeal of the client with the wisdom of the advocate. He dedicated not only his splendid abilities as a pleader, and his masterful knowledge of the law, but all the enthusiasm of his ardent nature, and the strength and energy of his body as well—to win. That is the true lawyer—such was he. His impulses were so generous, his temper so bland, his manner so gracious and gentle, that it was impossible not to love him. Possessing these qualities of head and heart, it is small wonder that he succeeded in winning clients and convincing juries.

The story of his professional life at Beaver Dam is best told by Mr. David S. Ordway, of Milwaukee, Wisconsin (who was, for many years, his business partner), in a letter to the Hon. H. W. Lander, President of the Bar of Dodge County, which was read at the meeting of the Bar Association, called for the purpose of paying its tribute of respect to the memory of Mr. Smith, who died at his residence at Beaver Dam on the 8th of December, 1899, in the 73d year of his age.

“Hon. Charles S. Bristol located in Beaver Dam in the Fall of 1842, and was the first lawyer who commenced practice in the County of Dodge, but left Wisconsin for California early in the Spring of 1849, creating a favorable opening and opportunity for a young lawyer, who had the courage, the inclination and the ambition to expatriate himself from his old home and surroundings, and to make the attempt of establishing a successful business in the then far west.

“Mr. Smith was at that time, when with men of affairs, non-obtrusive, modest and I might say, almost bashful—with very limited knowledge of business matters and the active duties of life. Having been a constant student in the schools and searcher after knowledge in books, he had neither time nor

opportunity to come in contact with men of business, much less to become familiar with business operations by actual participation in them. He was a close student, possessed of a remarkably logical and discriminating mind, even at that early age, and was well educated in the principles of the common law, and somewhat experienced as a student and clerk in common law practice, which then prevailed here, and must have been possessed to a greater degree than we then suspected of the moral courage and confidence necessary to success in his profession, in a new country and among strangers.

“At the time of his coming to Beaver Dam, after the removal of Charles S. Bristol, there was but one lawyer remaining there in practice, the Hon. George W. Green, a man of great good sense, of considerable experience, but of little book learning in the law, who had located in Beaver Dam in about the year 1846, and really controlled almost the entire law business of that part of the county, after Mr. Bristol's removal. Mr. Smith opened up his office and practiced alone for, perhaps, about a year, when he formed a partnership with Mr. Green under the firm name of Green & Smith, Mr. Green being at the same time Judge of Probate of the county. Of course, the law business of the county was then made up of matters involving small interests and amounts, as a rule, drawing of deeds and contracts, suits for personal collisions—assault and battery and trespass for private injuries—occasionally an action for slander, seldom for libel, as there were then no newspapers published in the vicinity, no so-called collection suits, no mortgage foreclosures, for the reason that up to that time very few mortgages had been given in this part of the country, those which were given were generally by farmers for moneys in small amounts to assist them in making purchases of their homesteads. All those matters of larger import and involving greater amounts followed along in the natural course of events, and not many

years after. The Revised Statutes of 1849, providing that any rate of interest agreed upon in writing should be valid, speedily changed the condition of things in this regard, and within about one year and a half, when the law was amended, covered this whole State, or part then inhabited, with twenty-five to thirty per cent, and over, mortgages from which attorneys, in after years, secured not only good livings, but even wealth, in collecting.

"This firm of Green & Smith continued until the fall of 1852, its dissolution being brought about by the purchase by myself of Judge Green's interest in the firm, and its small law library. I had then recently been admitted to the bar, and it was my good fortune to be associated as a partner with Mr. Smith, from that time on until the close of the Rebellion in the Spring of 1865. During those thirteen years and over, as a result of the close intimacy which existed between us, I think I came to know him perhaps as well, if not better, than any other person outside of his own family, now living. I wish to record right here the fact that during all those thirteen years I never saw him or knew of his being angry, personally disagreeable or offensive, and I will extend that period of time entirely down to the end of his life. I never witnessed an outburst of passion; I never heard an unkind or offensive expression, and I never knew him to be guilty of an unkind or ungentlemanly act during all the long period of our acquaintance. A more genial or desirable companion I never had or could wish for. His reading was extensive, his knowledge of general literature was varied and correct. He enjoyed the companionship of others and was always ready and able to contribute his full quota of anecdote and current literature of the day at all social gatherings at which he might happen to be present.

"The record of the professional life of Mr. Smith is to be found in all the volumes of the reports of the Supreme Court of our

State, from No. 3 in 1854 down to the year 1890 (about seventy volumes in all), when he left Wisconsin to enter the law department of the Union Pacific Railway Company, at Omaha, Nebraska. During that long period of time Mr. Smith was in the actual practice of his profession, having succeeded as early as the year 1855 in the building up, I might, I think perhaps, say, the leading law business of the County of Dodge, and having established the reputation, justly acquired, of being one of the most eloquent, successful, learned and most prominent jury lawyers in his vicinity.

"He was an alert, well read, and up to date jury lawyer; he also prepared, presented and argued his numerous cases in the courts of last resort with a thoroughness excelled by none.

"In 1872 he left Dodge County (not, however, removing his family) for Milwaukee, in order to avail himself of a wider field of action, and in hope of securing business of more importance than could be obtained in the country. For about ten years he was a member of the firm of Mariner, Smith & Ordway, of the last mentioned city; then upon its dissolution, became connected with the old firm of Finches, Lynde & Miller, and later still (after the death of Nathan Pereles), was the trial lawyer and senior counsel of the firm of Nath. Pereles & Sons, during all of which time, while so in Milwaukee, I think, perhaps, that he conducted a greater number of trials in the lower courts, and prepared and argued a greater number and greater variety of cases in the Supreme Court of our State than any other single attorney. His success was undoubted, and the amount of labor performed remarkable.

"I little thought when he came to Beaver Dam in 1849, a mere stripling, like David with his small stone from the brook and his sling, that he would ever succeed in overcoming the great Goliath in his path—that is to say, the obstacles and hardships before him, which must necessarily be overcome in

order to succeed, but I am happy to bear witness to the fact that he was possessed of greater strength, of greater knowledge, of greater perseverance, of larger hope and confidence than any other young man I have ever known in our State, starting in with as little knowledge of the world and as little pecuniary or other influence behind or supporting him."

As stated by Mr. Ordway, almost ten years of Mr. Smith's life were spent in the service of the Union Pacific Railway, in its law department, where he was brought into frequent contact with Senator John M. Thurston, between whom and Mr. Smith there existed a deep affection, as is evidenced by the following beautiful letter addressed to President Lander, which we quote *verbatim*:

"I regret that public duties make it impossible for me to attend the memorial services to be held in reference to the death of our old friend, E. P. Smith.

"The news of his death came to me as a blow. He was one of my oldest and dearest friends. To me he was not only the able advocate and jurist, the man of incisive intellectuality, the profound student, the tireless practitioner, but he was also the warm hearted, tender, considerate, lovable guide and instructor under whose guidance and assistance I first entered upon the study of law. In my judgment he ranked at the bar with the very ablest in the land, and in a wider field and under more favorable auspices would have taken no secondary place in the jurisprudence of our country.

"Much of whatever success I have achieved I feel is due to his wise counsel and advice, and my feelings toward him have at all times been more those of a son for a father than

of one member of the bar towards an associate. It was one of my greatest privileges to have him near me in professional work which required the most arduous and unremitting effort.

"In the service of a great railway system he won the admiration and respect of the judiciary and profession, and held to the end the confidence and esteem of his employers.

"Mourning his loss, as we all do, it is yet a consolation to feel that he had faithfully met all the requirements of rounded years, and there is of him only pleasant and honorable memories of a life work well done. The world was better that he was a part of it; his character remains an example to those who follow after, and we can all say from our hearts, 'Well done, good and faithful servant.' His monument is the honor and respect of all who knew him, and upon his grave there will ever bloom the undying blossom of our affection."

At a meeting of the Bar Association, held at Juneau, Wisconsin, on the 13th day of February, 1900, many beautiful letters were read, and memorial addresses delivered upon the life of Mr. Smith, all of excellent quality and tone.

Mr. Smith was married to Miss Agnes W. Hargrave, of Montreal, on October 23, 1862, who, with two children, Mrs. F. T. Galpin, of Waupun, Wisconsin, and Edwards Hargrave Smith, survives him. He was a Presbyterian in belief, and while he was not a church member his Bible was his daily study.

In person he was slightly below medium height, and of slender build, erect form and, as the accompanying portrait indicates, was a man of strong mentality.

A FORGOTTEN CHAPTER IN THE LIFE OF JEFFERSON.

By JOHNSON BRIGHAM.

LAWYERS and students of law will find much to interest them in an old book published at Charlottesville, Va., in 1829, entitled "Reports of Cases Determined in the General Court of Virginia, from 1730 to 1740, and from 1768 to 1772," by Thomas Jefferson. This little work of 145 pages is interesting to lawyers, both because of its distinguished editor, and because of its first place in order in the long list of Virginia's law reports; but, to the general student of law and history, chiefly because it contains, well concealed between the subject-matter of the work and the "Index of Matters" which follows the reports, a six page thesis signed "Th. Jefferson," entitled "Whether Christianity is a part of the Common Law." This thesis is not included in the "Writings of Thomas Jefferson," published by order of Congress early in the fifties, and is only indirectly referred to in the correspondence included in the nine volumes of that work. And yet, its vigor of statement, closeness of reasoning and independence of thought stamp it as characteristic of the great author of the Declaration of Independence and worthy a place in the collected treasures of that great mind.

The dissertation has for its subject, as its author affirms in his preface and sets out to prove in his work, "The most remarkable instance of judicial legislation that has ever occurred in English jurisprudence, or perhaps in any other. It is that of the adoption in mass of the whole code of another nation, and its incorporation into the legitimate system, by usurpation of the judges alone, without a particle of legislative will having ever been called on, or exercised towards its introduction or confirmation."

The Bishop of Lincoln, the defendant in the case, "pleads that the church of the

plaintiff became void by the death of the incumbent; that the plaintiff and I. S. each pretending a right, presented two several clerks; that the church being thus rendered litigious, he was not obliged, by the ecclesiastical law, to admit either until an inquisition *de jure patronatus* in the ecclesiastical court; that, by the same law, this inquisition was to be at the suit of either claimant, and was not *ex officio* to be instituted by the Bishop, and at his proper costs; that neither party had desired such an inquisition; that six months passed; whereon it belonged to him of right to present as on a lapse, which he had done. The plaintiff demurred. A question was, How far the ecclesiastical law was to be respected in this matter by the common-law court?"

Jefferson finds the defendant's contention to depend chiefly upon an error, or mistranslation, which occurred in Finch's Law, (B. I. c. 3), published in 1613. Quoting from Prisot a French authority, Finch misquotes the words "ancient scripture" translating them as "holy scripture," "whereas," he says, "it can only mean the ancient written laws of the church." This contention is sustained by *a priori* reasoning and by argument from authorities.

Jefferson then turned the light in upon English law during the formation period of England's history, his purpose being to show that upon this demonstrable mistranslation, and upon nothing else, was founded the theory of church and State which in his judgment has wrought much evil and harm.

"For we know," he writes, "that the common law is that system of law which was introduced by the Saxons, on their settlement in England, and altered from time to time, by proper legislative authority, from that to the date of the *Magna Charta*, which terminates the period of the common law,

or *lex non scripta*, and commences that of the statute law, or *lex scripta*. This settlement took place about the middle of the fifth century; but Christianity was not introduced till the seventh century; the conversion of the first Christian King of the Heptarchy having taken place about 598, and that of the last about 696. Here, then, was a space of 200 years, during which the common law was in existence, and Christianity no part of it. If it ever, therefore, was adopted into the common law, it must have been between the introduction of Christianity and the date of the *Magna Charta*. But of the laws of this period, we have a tolerable collection, by Lambard and Wilkins; probably not perfect, but neither very defective; and if any one chooses to build a doctrine on any law of that period, supposed to have been lost, it is incumbent on him to prove it to have existed, and what were its contents. . . . But none of these adopt Christianity as a part of the common law. If, therefore, from the settlement of the Saxons to the introduction of Christianity among them, that system of religion could not be a part of the common law, because they were not yet Christians; and if, having their laws from that period to the close of the common law, we are able to find among them, no such adoption, we may safely affirm (though contradicted by all the judges and writers on earth) that Christianity neither is, nor ever was, a part of the common law."

Jefferson then adds negative proof of the correctness of his position. He points to the silence of Bracton on the subject in his treatise on the common law, written a few years after the *Magna Charta*, silence all the more convincing because he himself was an ecclesiastic and would not have failed to introduce a subject so important to the church. He finds Glanvil, Fleta and Britton, and other early writers on the law, equally silent on the subject.

"It was reserved for Finch, five hundred

years after, in the time of Charles II., by a falsification of a phrase in the Year Book, to open this new doctrine, and for his successors to join full mouthed in the cry, and give the fiction the sound of fact."

But, turning to the laws themselves, the genuine laws of Alfred and the Jewish laws, we find, as Jefferson found, inconsistencies which cannot be reconciled on the theory invented by Finch and given respectability by Sir Matthew Hale.

The Jewish code punishes murder with death. Alfred punishes murder by a fine, called a weregild, proportioned to the condition of the person murdered.

By the Jewish law, to strike a woman with child so that she die is death. By the code of Alfred, the offender pays a weregild for both the woman and her child.

In Exodus, the servant who loses an eye or a tooth at the hand of his master receives his freedom. In Alfred's laws, a fixed sum is paid as compensation.

Theft of an ox or a sheep, under Jewish law, was repaid five fold for the ox, four fold for the sheep. The Alfredian idea of justice was payment of the worth of the cow, and forty shillings indemnity.

If an ox gore a man, the Jews kill the ox and abstain from eating the flesh. Alfred compensates the wounded person by giving him the ox.

Let these selected instances suffice. Jefferson maintains that the pretended laws prefixed to the real laws of Alfred, covering concubinage, theft, retaliation, compulsory marriage, usury, bailment, laws known to historians as the Pseudograph, were never the laws of England in Alfred's time, nor at any other time; that they were, as Houard in his *Coutumes Anglo-Normandes* terms them, *Hors d'oeuvre* of some pious copyist. "This awkward monkish fabrication makes the preface to Alfred's genuine laws stand in the body of the work. And the very words of Alfred himself prove the fraud; for he declares in that preface that he has

collected these laws from those of Ina, of Offa, Æthelbert and his ancestors, saying nothing of any of them being taken from the scripture." The inconsistencies above quoted seem to remove all further question in the point.

And now comes Jefferson's severe arraignment of English jurists from the time of Matthew Hale down to his own time. "Yet, palpable as it must be to a lawyer, our judges have piously avoided lifting the veil under which it was shrouded. In truth the alliance between Church and State in England has ever made their judges accomplices in the frauds of the clergy; and even bolder than they are; for instead of being contented with the surreptitious introduction of the four chapters of Exodus, they have taken the whole leap and declared at once that the whole Bible and Testament, in a lump, make a part of the common law of the land; the first judicial declaration of which was by this Sir Matthew Hale. And thus they incorporate into the English code laws made for the Jews alone, and the precepts of the gospel, intended by their benevolent author as obligatory only *in foro conscientiae*, and they arm the whole with the coercions of municipal law."

Turning now to a letter written by Jefferson to Maj. John Cartwright June 5, 1824,¹ four years after the publication of this thesis, we find that the more Jefferson reads and thinks on the subject in question the more indignant he becomes. After briefly covering the general ground of his argument, he proceeds to show that Finch founds his doctrine on the mistranslated words of Prisot, written a century and a half before; that Wingate, forty-five years later, erects this false translation into a maxim of the common law, copying Finch but citing Prisot; that Sheppard copies the same, quoting Finch and Wingate; that Hale long afterward uses the authority but makes no

citation; and so on down, through Wood, Blackstone, and Mansfield, the later authorities falling into the original error.

Viewing this error in the light of a crime, Jefferson closes a long paragraph with this harsh conclusion: "What a conspiracy this, between Church and State! Sing Tantarara, rogues all, rogues all, Sing Tantarara, rogues all!"

It will thus be seen that while the sage of Monticello at eighty-one had lost none of that power of analysis which made him great, his patience, once believed by himself to be well nigh infinite, had discovered its limitations. When, soon after, Major Cartwright caused Jefferson's frank and informal letter to be published without authority from him, the full limit of his patience was reached.

In a letter to Edward Everett, dated Monticello, October 15, 1824,² Jefferson writes: "The publication of the letter in such a case, without the consent of the writer, is not a fair practice." But the author stands by his guns. He says the judges and divines "may cavil but cannot refute it." And then he reviews his argument, concluding with, "A license which should permit 'ancient scripture' to be translated 'holy scripture' annihilates at once all the evidence of language. With such a license we might reverse the sixth commandment into 'thou shalt not omit murder.' It will be the more extraordinary in this case, where the mistranslation was to effect the adoption of the whole code of the Jewish and Christian laws into the text of our statutes, to convert religious offenses into temporal crimes, to make the breach of every religious precept a subject of indictment, submit the question of idolatry, for example, to the trial of a jury, and to a court, its punishment, to the third and fourth generation of the offenders."

The long letter closes with this characteristic bit of autobiography not included in

¹ Writings of Jefferson, Vol. VII. p. 355.

² Writings of Jefferson, Vol. VII. p. 380.

Jefferson's formal "Autobiograph;" nor is it even mentioned by the several biographers of Jefferson whom I have consulted—with the one exception of Parton. Tucker's authorised "Life of Jefferson" makes no mention of the subject whatever. Jefferson writes his friend Everett, "I do not remember the occasion which led me to take up this subject, while a practitioner of the law. But I know I went into it with all the research which a very copious law library enabled me to indulge, and I fear not for the accuracy of my quotations. The doctrine might be disproved by many other and different topics of reasoning, but having satisfied myself of the origin of the forgery, and found how, like a rolling snowball, it had gathered volume, I leave its further pursuit to those who need further proof, and, perhaps, I have already gone farther than the feeble doubt you expressed might require."

The simple allusion made by Parton to

this early investigation of the subject is in the story of Jefferson's student life.¹ Parton refers to a lengthy abstract, numbered "873," which fills seven and a half octavo pages, bristling all over with references, old French and law Latin. It is evident that upon this abstract—so confidently referred to in his letter to Everett more than a half century later—was constructed the thesis under consideration. Sentences quoted by Parton are identical with passages in the thesis; but the so-called abstract in several respects goes wide of the range of the argument as presented in the thesis. Interesting as a study in and of itself, the circumstances under which this thesis was thought out and wrought out in the youth of our great commoner, and finally brought out in his old age, gives much of added interest to the study of the appendix in this first Virginia report.

¹ Parton's *Life of Jefferson*, p. 48.



CURIOUS OLD ROAD LAWS.

A VERY wealthy American who some time ago purchased a fine estate in England had his eyes opened recently to certain peculiarities of British law. It appears that traversing his estate is a road which has been in use by the common people for many years. This road he decided to close, but he presently found that he had undertaken no easy task. At the end of the road was a ferry, and as the Government could not be persuaded to disestablish this ferry, the path to it must be kept open. The only thing the disgruntled owner of the estate could do he promptly did, and that was to prohibit the passing of all vehicles; not so much as a wheelbarrow would he allow to go by, and the unfortunate ferryman is now compelled to convey his heavy supplies by the main road, a roundabout distance of two or three miles.

Some of the old English laws against the closing of roads are very singular, and are certainly fit matters for repeal. For example, if the following of a footpath will enable the traveler to avoid a crossroad where a footpad, a highway robber or a suicide has been buried, the footpath must be kept open.

Again, if a dead body has ever been carried along a public highway, semi-public road or private footpath, that highway, road or footpath must never be closed. Just how or why this law originated it is not easy to discover, but as most of the footpaths have been used as a short cut for a funeral, this keeps open a goodly number of paths forever, or until the law is repealed.

If a bride has been led over a footpath to her new home, it has acquired the right of perpetual existence in many parts of England.

If a road or short cut has been in constant use for ten years, nothing short of an act of

Parliament or the making of a new law will allow it to be closed.

If the abandonment or closing of a footpath makes it necessary to cross a plowed field, a meadow or a field of grain, in passing from one highroad to another, the law forbids its being closed. And this reminds me of a curious law concerning fields and meadows. A meadow that has been sown with hay for twenty years, must not after that period be sown with anything else. This law was enforced only last year. A farmer living on a farm which had been in his family for many generations, thought to enrich his land by rotation of crops. He started to plant wheat in his meadow, but he was promptly stopped. The twenty year period had elapsed, and a meadow the land had to remain.

If a footpath, road, or roadway leads directly to, across, or through a church or churchyard, it may never be closed.

If a path leads down to a river, brook, or other running water, the law, in some parts of England, at least, says it must not be closed.

If watercress, pungent grasses, mushrooms, or other edible products grow at the end of or along the course of a footpath, or if edible acorns be found there, certain old-fashioned laws, probably dating back to a time when food was neither cheap nor plentiful in England, declare that it must be kept open.

On the other hand, we find that there are many roads and even streets in large cities which can be closed to the public completely at the command of a single man—the man who owns the estate they traverse. There are streets even in London which are closed daily during certain hours of the morning and evening, and which must be closed one entire day each year if the title to them is to

be kept valid. One sees in the Bedford and Westminster estates in London, streets spanned by gates which are closed against the public during the early morning and late

evening hours. Ducal beadles once stood at these gates and barred the way of any who would pass, but nowadays the gates are simply locked and bolted.

FROM LAW TO LITERATURE.

BY GEORGE H. WESTLEY.

MR. MELVILLE D. POST, in his post-prandial address (see the *GREEN BAG* for December, 1899), felicitously metaphors the lawyer who dabbles in literature into "one who, having taken to his roof-tree a stately dame, turns aside on occasion to swagger through the streets with her unconventional sister." Those who observe the flirtation, he remarks, are apt to wag their heads and predict an early appearance at the divorce court.

Truly to this pass does it generally come, and the "stately dame" and her inconstant lover go forever their separate ways. If the reader is interested to see how numerous are such cases, let him glance over the following long and yet by no means exhaustive list of divorces.

To begin the catalogue with an illustrious name, Sir Walter Scott read law in his father's office and was admitted to the bar. Macaulay was a lawyer, and he had not yet relinquished the profession when he wrote "The Battle of Troy" and his "Essay on Milton." Dickens and Disraeli both worked in solicitors' offices. Thackeray was a lawyer and so was DeQuincey. Bailey of "Festus" fame abandoned the bar for poetry. Hazlitt did the same, and so did Tupper. Charles Reade was a barrister before he took to writing plays and novels. Lockhart studied law in Edinburgh and became an advocate. He then travelled in Germany, returned home and settled down to a career of letters. Tom Moore was a student at Middle Temple. George Henry Lewes, perhaps less famous

for his writings than for his association with "George Eliot," worked for a time in a lawyer's office. He gave up the law for medicine, and the latter in turn for literature.

Samuel Warren, famous on account of his "Ten Thousand a Year," which is said by some to be among the best fifty books of the world, was a lawyer. But Warren, even after his great success as a novelist, did not lose touch with his first profession. He wrote and edited law books almost to the end of his career. "Barry Cornwall" practiced as a solicitor before entering literary life.

The biographer of Malone tells us that frequent explorations of black-letter law led him, Malone, onward to the taste for its poetry and dramatic literature. "He forsook law, wealth, and probably station, for unprofitable literature." David Hume was set to study law by his father, but while the latter believed his boy to be poring over Voet and Vinnius, he was devouring Virgil and Cicero. Chatterton threatened suicide in order to effect his release from law. Poor Chatterton, "sleepless soul," he starved in literature and ended a suicide after all.

Henry Fielding of "Tom Jones" fame studied law, but mainly occupied himself in writing plays and managing theatres; so that it was not until fifteen years after he began that he was admitted to the bar. Being thus half-hearted in his profession, he was not a success as a lawyer, and soon he turned his whole attention to authorship, turning out novel after novel with great rapidity. Cowper spent nine years in the Temple, but

devoted most of his time to literature and to associating with wits and scholars. Henry Hallam was a solicitor before he engaged in historical studies. Leigh Hunt spent some time in an attorney's office. John Stuart Mill began to study for a legal career. Wilkie Collins, after a try at the tea trade, took to the law, and was admitted to practice. Jovial Tom Hughes, of Oxford story fame, was connected with the profession. Lawrence Oliphant forsook the law for journalism. H. D. Traill did likewise. Theodore Watts-Dunton and Frederic Harrison are two more on the list. Joseph Hatton was taken in hand by a man who could have advanced him in the legal profession, but the young fellow had other plans. Alfred Austin, the present poet laureate of England, was a student of the Inner Temple, and was called to the bar.

In France, Montaigne studied law and attained to a magistracy, but being dissatisfied with the state of French jurisprudence, and strongly objecting to the use of torture, he resigned his office. Boileau tried law and theology before he settled down to letters. Le Sage of "Gil Blas" fame, in his early years gave some attention to law and philosophy. Montesquieu attained a counselship to the Parliament of Bordeaux, but he had little taste for the profession, and was more of a philosopher than a practical lawyer. Thiers studied law at Aix and in the course of time made his appearance at the bar. He felt, however, that he were better employed writing history, and to that he took. Voltaire, after some study in a procureur's office, found the legal atmosphere stifling. Carlyle says of him: "Law with its wigs and sheepskins, pointing towards high honors and deep fleshpots, had no charms for the young fool; he could not be made to like the law." Balzac was apprenticed to a notary in Paris, but spent most of his time writing for the journals. Diderot and Piron are two other French writers who had been connected with the law.

Germany too can supply us with examples. Goethe studied law and received the Doctor's degree. He began to practice at Frankfort, but soon slid into literature. Schiller's parents wished him to be a divine, and it was his own choice also, but circumstances led him into the study first of law, then of medicine, and finally landed him in the profession which gave him his fame. Heine tried banking, trading and lawyering before he gave himself up to poetising.

In Russia, Tolstoi spent some time in the law department at the University of Kazan, but he got tired of the study, went home and became a soldier. Metastasio, the Italian poet and dramatist, was educated by Gravina, the jurist.

Nor are there lacking contributions to the list from our own country. Washington Irving entered Judge Hoffman's office in the year 1801, and studied there for three years. He says in his "Life and Letters," "I felt my own deficiency and despaired of ever succeeding at the bar. I could study anything else rather than law, and had a fatal propensity to belles lettres." Lindley Murray was a lawyer in New York in 1768, and in England a few years later. He settled in England, gave up the law, and devoted the remainder of his life to literary and scientific pursuits. Noah Webster at twenty made up his mind to be a lawyer. He had no money and was compelled to take up school-teaching, studying law in his spare hours. He was admitted to the Connecticut bar, but could not make a living from the practice of his profession, so he took to writing school books, and later to the making of his great dictionary. Motley, our American historian, studied law, and so did Prescott. The latter had trouble with his eyes, owing to an accident at school, and his studying made him temporarily blind. For this reason he had to give up law.

Walt Whitman was a lawyer's clerk in 1832, before he began his roving life as a printer, schoolmaster, editor, printer again,

journalist, house builder, surgeon's assistant and clerk in the Interior Department. Those who profess to know, declare that Whitman was a poet, and so he may properly may be included in this list. Richard Henry Dana, who wrote that very popular book, "Two Years before the Mast," studied law under Judge Story, and was admitted to practice. Charles Dudley Warner was on a time also of the profession. Thomas Nelson Page practiced at the bar, and so did John Hay. General Lew Wallace was studying law at the opening of the Mexican War. He went, returned, completed his studies, and practiced in Indiana, until he again went forth as a soldier in the rebellion of '61. Again he returned to his profession, but indulged during his spare time in literary pursuits, out of which indulgence came "The Fair God," and later the more famous "Ben Hur." Henry James entered the Harvard Law School in 1862, and presumably continued his studies in the profession until 1865, in which year we find him entering the field of literature. John Fiske, the historian, is another of our authors who studied law at Harvard. Of our critics, Hamilton Wright Mabie was called to the bar, and practiced for some time.

Coming now to the younger school of English writers, we find that Anthony Hope Hawkins, after leaving Oxford, went to London and read law at Lincoln's Inn and the Middle Temple. He was called to the bar in 1887. His first brief was for the defense of a lot of ruffians who were charged with assaulting a policeman. He was very nervous and his clients were all convicted. Briefs coming slowly, he took to literature to eke out his small income. Stanley Weyman, who has been called the "Dumas of the hour," was admitted to the bar in 1881, and practiced his profession for ten years. His first brief was in a case about a tailor's bill. Charles Dickens, Junior, was on the opposite side, and Weyman lost. During his decade of practice he had been

flirting with literature, and finally she wooed him from the law altogether. H. Rider Haggard was called to the bar some fifteen years ago. He commenced his career at the Probate and Divorce Court, and wrote "King Solomon's Mines" in the leisure evenings of his first term. He awoke one morning to find himself famous, not as a barrister, but as a novelist. Quiller Couch, who despite some very fine work seems somehow only to have half arrived, intending to study for the law, but made such a success with his first book that he gave up the idea altogether.

George Meredith was trained for the profession, but he preferred to become a poet, in which capacity he made his entrance into literature. Robert Louis Stevenson's father intended that his son should follow the family profession of civil engineering; but Robert had not the taste for this and he made known to his father that he had already chosen a life work and would be a writer. The old man was pained and anxious. He could not see success in literature, and he told his son that at any rate he should have a profession to fall back upon, in the event of his own choice proving an unfortunate one. And so it was that Stevenson was introduced to law. A biographer says: "His position in the office was neither that of a clerk nor of an apprentice, but merely of a person gaining some knowledge of the business. He never received any salary, and, as is usual with aspirants for the bar, his position was in no way subject to the ordinary office discipline." Our author was but an indifferent law student. One of his co-workers says he remembers that Stevenson made no less than five errors on two short pages of one deed that he drew up. His thoughts were on other things. In spite of this lack of interest, however, he passed examination with credit, and was called to the bar. He gave away the few briefs he got, and was soon immersed in his dear literature.

James Rice, the well-known literary partner of Walter Besant, was a lawyer, and so was R. D. Blackmore. F. Anstey and W. E. Norris are two others on the list. St. George Mivart, the English naturalist and philosopher, was of the profession, and so was John Morley.

Among the dramatists and comedy writers, we have W. S. Gilbert. This well-known author intended to enter the army, but the Crimean war coming to an end, he took up law. He began contributing to the comic periodicals, and was invited by one editor to continue with a column of matter "for the term of his natural life." He thereupon shook off the law, for which he had neither taste nor aptitude. Pinero was educated for the legal profession. Subsequently he became an actor, then an author. Sydney Grundy is another playwright who was once a lawyer. He practiced for six years. F. C. Burnand is still another. And going back a little, we have Tom Taylor, Thomas Morton, and John Ford. Samuel Foote began studying Coke, but was a truant in a trice. Wycherly began and ended in the same fashion. Both the George Colmans were educated for the legal profession, and looking abroad we gather in LaMotte, Corneille, and Scribe.

To throw in a few Continental authors for good measure, we may name Jonas Lie, of Norway, who has been classed only a little lower than the great Ibsen, Maarten Maartens, the Dutch novelist, and Maurice Maeterlinck. The latter did not progress very far in his law studies, although his parents had marked out the career for him. He once said, referring to the matter: "I could not be troubled about my own affairs; was it likely that I should care to manage other people's?"

A few cases have been known where the wanderer from the Temple of Themis returned, or to carry out Mr. Post's happy metaphor, where the stately dame received again her errant wooer. So was it with Hoffman, the Poe of Germany. He had studied law and practiced it for a time, but dropped it to take up music. Ten years later he was again attached to the law, and he remained so until his death. Valdes, the Spanish poet, furnishes another case of the kind, but a more striking example than either is found in Canning, the elder. He wrote:

Then welcome Law! Poor Poesy, farewell!
Though in thy cave the loves and graces dwell,
One Chancery cause in solid worth outweighs
Dryden's strong sense, and Pope's harmonious lays.



HIS FIRST CLIENT.

BY DAVID H. TALMADGE.

IN the office of a certain hotel, in a certain county seat, on a certain night in 1898, a number of lawyers, with Judge B——, found in reminiscence relaxation from the worries incidental to the Circuit Court, which was then in session. There were several interesting stories told that night, but the one which made the most impression upon myself and, I believe, upon the company, was told by the Judge. I give it, as near as memory will permit, in his own words:

Some of you may remember the robbery of Major Close, of Stilsonville, in the early 70's. There was sufficient of the sensational about it to recommend it to our friends, the newspaper men, and they made much of it. Yet they might have made more—had they known.

There was no bank in Stilsonville at that time, and the Major, being the business head of the place, occasionally had considerable sums of money in his possession. He had no safe; said he did not want one of the bunglesome things in the house; but he took what he considered, and what any of us would have considered, very great precautions against robbery.

The room in which he slept had brick walls, the original house had been of brick, and the door was a massive oaken affair with triple locks. There was but one window, and that was covered by a heavy steel netting, screwed on from the inside. The box in which the valuables were kept—an ordinary metal box with a key lock—occupied a place upon a bureau, set against the wall at the foot of the bed, where the Major could clap his eyes upon it the instant he awoke. Furthermore, the Major was a capital pistol shot, and had a reputation for courage which extended pretty well all over that section of the country. You will read-

ily understand that it was not what the professional cracksman would term an "easy lay."

Nevertheless, the strong box was opened one night while the Major slept with his finger upon the trigger of his pistol, and something over five thousand dollars were taken from it. The netting at the window remained intact, the locks of the door showed no evidences of having been tampered with, and altogether it was a black mystery from the very beginning.

There was but one person suspected, even remotely, of the robbery,—the Major's manservant, Horace Steele by name, and, gentlemen, as I have learned since, one of the cleverest rascals ever born. Steele was suspected more because the State's attorney insisted upon it than for any other reason. There was little—absolutely nothing in fact—pointing to him as the perpetrator of the robbery. He had been in the room during the afternoon, and again shortly before the Major retired, but the Major testified that he had looked into the box subsequent to dismissing the man and locking the door, and that the money was then intact.

However, Steele was arrested, and he was kind enough to secure me as his counsel. I was young then, and he was virtually my first client. Naturally I took up the case with avidity, and knocked down the flimsy arguments of the prosecution as fast as they were presented, Steele sitting in the prisoners' box, watching me with twinkling eyes.

When the trial was over, and the jury had returned a verdict of "not guilty" without leaving their seats, he shook me warmly by the hand, and we walked down the street together to my office, where he astounded me by placing two hundred dollars upon the table. "That is your share of the swag," he

said, laughing. "It was worth it to hear you go after those fellows. You have it in you, sir, to become a great lawyer. I shall look to see you upon the bench some day." You see, gentlemen, he was a prophet, but I thought he was joking at the time. Then he bade me good-bye very cordially, before I had quite recovered from my astonishment, and departed, never to be seen again in those parts.

I went up to the Major's that night to see Steele, for the magnitude of the fee had aroused a suspicion within me that he had not come by the money honestly, but he was not there—had not been there since the trial. He had, it was evident, been prepared for a speedy departure. Then it occurred to me that the money might be a portion of that taken from the Major's box, and I submitted it to the Major's inspection. I trembled as I did so, too, for not only did I need the money badly, but I was afraid people would laugh at me if it should come out that I had been paid for my services in the case with stolen money. However, my apprehension was short lived. The Major recognized one of the bills as having been paid to Steele some time before, but declared that none of them had been among those stolen. I danced all the way home. You, gentlemen, perhaps know from experience what a marvelous tonic a man's first two-hundred-dollar fee is.

Well, the mystery remained unsolved for years. I had all but forgotten it until one night, two years ago, in a New York hotel, I read in the daily paper of another robbery which was in some respects its counterpart,—just such another clean piece of thievery,—no clue, or suggestion of a clue, to the perpetrator. That is the real test of good work in such things. The men who can plan methods of stealing money are plentiful enough, but those who are sufficiently clever to cover their tracks so that not even a suspicious circumstance remains are not so plentiful. I do not remember having known

more than one of this sort. Were all thieves like him, the business of the police courts would be very materially reduced I am afraid.

I chanced to glance over the top of my paper as I finished reading the account, and caught the eye of a gentleman whom I had never seen before to my knowledge—an elderly gentleman, who carried upon him that peculiarly indefinite air that marks the person of refinement and high ideals. Evidently he had been looking at me for some time. As our eyes met, he spoke. "Rather an interesting piece of thievery, sir," he said, much as though the matter had been under discussion between us. "It seems to have been remarkably well planned and executed," I replied. "Did you ever know of another piece of work as good?" he asked.

Then I told him of the Stilsonville case, and he seemed much interested. "And the thief was never discovered?" he inquired, when I had finished. "Never," I replied; "the case is as great a mystery now as it was then. It can hardly be accounted for by other than supernatural reasons." He laughed. "It is very peculiar," he said, offering me a cigar and lighting one himself, "but I once knew of a case almost identical with the one of which you have told me, and in this case the method by which the thief accomplished his purpose was plainly revealed several years later by himself to a legal friend,—a judge, by the way. It appears that this thief had but little in common with others of his ilk." "It is very obvious that the Stilsonville thief hadn't," said I, firmly.

The gentleman raised his paper from his lap, and looked at it for some time. "No clue—absolutely no clue," he said musingly, repeating the headlines. "How blind they are! This thief was wise. He followed the very simple method of covering his tracks before he made them—which, although it sounds paradoxical, is nevertheless expressive of something near the facts. It was so with

this other whom I mentioned. It was his plan to secure respectable employment in the immediate neighborhood of stealable property. Thus no mention was ever made in the newspaper stories, which invariably followed his exploits, of suspicious characters having been seen lurking about the premises. The telegraph—so potent a factor in the capture of ordinary thieves—might as well have had no existence so far as he was concerned. And when the average county sheriff or police official cannot send out what he calls an ‘alarm’ he is—well, he is stumped, as the expression is.” Which is more truthful than poetical, gentlemen, as most of us have had occasion to observe.

The robbery of which he told me seemed identical with the one at Stilsonville. The thief had obtained a position in a wealthy man’s household in an isolated community, and had by sheer force of a charming personality ingratiated himself into the wealthy man’s confidence. He had remained nearly a year, during which time he had received fairly good wages and a comfortable living besides—in fact, had honestly accumulated something over three hundred dollars in cash. At the end his opportunity had come, and he had removed several thousand dollars from his employer’s strong box; had stood trial for the robbery because he had been the only one who could, under any possibility, have committed it; and, having been declared innocent, had departed for other fields in which to exercise his peculiar talent.

On the night of the robbery he had been in his employer’s room at bedtime. “And,” said this chance acquaintance of mine, “he had placed the candle in its accustomed place upon the bureau, arranging the while the other articles which were upon the bureau so that the light might shine clearly upon the strong box. Some days previous, when the box had been empty and his employer absent, he had filed the catch of the lock so that it failed to perform its office, although any person who turned the key in the lock

would have noticed nothing wrong. It was easy for him, while at the bureau that night, to remove the package of money from the box and insert another package in its stead, for he had prepared the water for his employers’ invariable face and hand bath with spirits of ammonia, and that worthy man was for a moment or two quite blinded by tears. Both packages were tied with dark-colored string, but the string, about the false package was a fuse, one end of which he trained quite invisibly so that it hung out at the end of the box. Beyond this, he trusted to his employer.” “Trusted to his employer!” I exclaimed; “I do not understand.” “No?” said my acquaintance, smiling. “It was quite simple, I assure you. The wind blew strongly from the east that night. The window of the room was on the east side. His employer never failed to open the window a bit, to afford ventilation, the last thing before getting into bed. The thief calculated that the wind would blow the flame of the candle against the fuse after the candle had burned two hours, and his calculations were correct, as they should have been, for he had demonstrated the correctness of his figures carefully before making his last move, so to speak. Ah, it was fine work!” “Yes, but why did he not ignite the fuse himself?” I asked.

My acquaintance looked at me as though I had pained him. “You evidently were not cut out for an artist of that sort,” he said rather disgustedly. “A burning fuse smells. Besides, he considered that his employer would probably take a glance into the box before retiring, and in such an event the job would be bungled. Now, the substitute package was composed of celluloid—thin sheets, cleverly painted. In the bottom of the package, connected with the fuse, was a diminutive nitro-glycerine cartridge—of power quite sufficient to throw the lid of the box upwards, and to dissipate the charred remains of the fuse. Of course, the celluloid, once ignited, left practically no remains. If you have ever burned a piece of celluloid

you can appreciate the truth of this statement." I suppose I must have had a somewhat blank expression upon my face as he told me all this, for suddenly he burst into a laugh. "It does sound a good deal like a yarn, doesn't it?" he said. "I am afraid you do not believe it." "O, I believe it," I blurted; "I believe it—but, confound it; think how I defended that wretch! It makes me mad." And then he laughed again.

Gentlemen, the following morning I received a letter—a letter written in a hand closely resembling copperplate—just such a one as I would have expected to emanate from such a source. "My dear Judge," it said, "You are such a simple, guileless, confiding old chap! Did you see no resemblance between your chance acquaintance of last evening and the man whom you labored so gloriously to clear of the charge of stealing Major Close's money? He knew you the moment he set his eyes upon you, and

he could not resist the temptation of telling you how the little game was worked. He is sorry that he will not be permitted by circumstances of seeing you again while you are in New York. He trusts that you have no ill-feeling for him. He gave you two-thirds of all the money he earned honestly while in the Major's service. He knew that you needed it. And he prays that you will not forget it." And then he concluded with a bit of advice. "Don't, my dear Judge, ever try to take up this sort of thievery. Stick to the law,—that sort is safer and more in keeping with the qualities nature has given you. You are not overly bright, to be candid; but Horace Steele will ever think of you kindly." Gentlemen, I believe that he himself had committed the robbery of which I had been reading in that morning's paper, and to this day I never read or hear of an especially well-planned robbery but I imagine I see it in the hand of my first client. Confound his impudence!



OATHS.

"HOW THIS WORLD IS GIVEN TO LYING."

IT has often occurred to us as somewhat singular, that among the multitudinous reforms of this age of reformation, one of the greatest of the abuses which exist in our society has been almost entirely overlooked; and while a vast deal has been said and done in relation to matters which are merely theoretical, a subject which is practical in all its bearings, and important in its results, has been neglected. We allude to the widespread and shocking perversion of the *judicial oath*. The subject is worthy of attentive consideration. It has an immediate relation to all our rights, because no controversy can be conducted before a legal tribunal, except through the medium of evidence — truth can only be arrived at by the examination of testimony, and in the proportion that truth ceases to be respected, will the stream of justice be poisoned.

There is also a question in morals, of no light import, involved in this discussion. Truth lies at the foundation of all the virtues, and whenever she shall cease to sustain the social edifice, the whole fabric will totter.

If we reason from what we see, without suffering ourselves to be deluded by self-esteem, or national vanity, we cannot deny, that as a people, we are dreadfully addicted to the sin of falsehood. The *prima facie* evidence of this proposition is found in the multiplicity of asseverations with which we think it necessary to fortify our most trivial assertions, and the solemnities by which we endeavor to enforce integrity in the most ordinary civil transactions. Where there is so much precaution, there must be some distrust. The man who asseverates to that which has not been denied, must either doubt the truth of what he is saying, or question the respectability of his own character; and the legislature which cannot intrust the per-

formance of the most simple duties to a citizen, without requiring of him an oath of fidelity, can have little confidence in the virtue of the people, or the purity of public sentiment.

Truth is simple and beautiful — majestic and imposing. It is in itself eloquent and convincing. It has been well said to be *mighty*. Like that purity, in the presence of which the lion is supposed to be tamed, truth is arrayed in a sacred and a graceful garb, which gives it irresistible power. But that strength is an inherent self-efficiency, whose simplicity is its greatest ornament, and strongest bulwark; and every artificial guard thrown around it by society, destroys some feature of its loveliness, or dismantles the citadel which nature erected, by drawing off its defences into the outworks contrived by art.

Truth is confiding in its character; it neither suspects, or supposes itself to be suspected. So well understood is this principle, that we always doubt the assertion of him who takes great pains to prove his own veracity. The man who modestly and seriously states a naked fact, as having occurred within his own knowledge, is usually believed; he stands in the position of an unimpeached witness, whom no one will take the responsibility of contradicting. If to the assertion of a fact, he adds an argument, to convince his hearers that he has told the truth, he weakens his evidence by the admission that his veracity may be distrusted; and if he voluntarily swears to the truth of his own statement, or calls a witness to prove it, he betrays a consciousness that his own word is not worthy of belief. If the character of our society be tested by this rule, how unfavorable must be the verdict. How seldom do we hear a narrative, or the expression of an opinion, which is not reinforced by an oath, or an ap-

peal to our sensibilities, or a strong asseveration.

There is every variety of swearing, from the horrid profanity of the vulgar boatman, down to the gentle imprecation of the fair lady. The female swearer "wishes she may never stir," or what is infinitely more dreadful, "that she may never *speak another word*," while the more florid eloquence of a masculine imprecation calls down utter destruction upon the soul of the speaker, or upon some unoffending member of his body. The lady contents herself with a *vow*, or with a simpering appeal to "goodness," or to some other diluted appellative, under which she is pleased to disguise the sacred name; while the gentleman not only swears manfully, but compounds his oaths, from positive to superlative, until he exhausts the energies of the blasphemous vocabulary. Here and there you meet with a modest man whose imagination is not prurient in these figures of rhetoric, and who satisfies himself with "no mistake," "no two ways about it"—"you won't catch me in a lie, no way you can fix it," or another, who asserts that what he has said is "true as preaching," while you more frequently encounter a bolder spirit, who maintains that he is willing to swear to what he has said, "on a stack of Bibles big as the Allegheny mountains."

It is always difficult to trace a national propensity to its original source; but we think that much of the levity to which we have alluded may be fairly attributable to the spirit of our laws, and to the practice of our legal tribunals. Too little regard is paid to the solemnity of an oath, and its sanctity has been degraded both in the frequency with which it is used, and the callous irreverence with which it is administered. The evil exists, first in the legislative assemblies of our country, who impose too many oaths; and secondly in our courts and magistrates, who permit the daily and hourly use of that, whose sanctity it is their special duty to preserve inviolate.

The great error committed by our legislatures consists in degrading the dignity of an oath, by requiring it to be used on common and trivial occasions. Officers of every grade are required to take official oaths. The very lowest officer is not permitted to exercise the comparatively unimportant functions of his station, without being sworn; and even their deputies, where such are recognized, are required to perform the same ceremony. The principle is even carried further, and made to apply to persons, who without holding public offices, are for the time being, in the discharge of public duties. Not only all officers, from the highest to the lowest in dignity, but persons discharging public trusts of every description, are required to take a solemn oath previous to entering upon the discharge of their duties.

We doubt whether any ministerial officer, or any subordinate agent, ought to be required to take an official oath. No man should be employed in public business, whose character for integrity is not a sufficient pledge that he will discharge faithfully the trust committed to him. To administer an oath to a bad man is idle, for he will disregard it; it is unnecessary to require a good man to swear that he will do his duty, for he will do that at any rate.

Most men are honest because it is their interest to be so. If regard for reputation, respect for public opinion, the fear of punishment, and the desire to retain office, will not secure the fidelity of public agents, the sanction of an oath will throw but a slender restraint upon their vicious inclinations.

The legislature should adopt the principle of placing full confidence in the man who is placed in a public trust, presuming him to be honest who is thus honored; or else, they should demand a higher security than the word or oath of the individual. In the first instance, they would act upon the supposition that appointments are judiciously made, and perhaps such a plan might lead to a greater degree of caution on the part of the appointing power; in the other, the government

would pursue the course adopted by prudent individuals, and would take care to exact such security of the agent as to make it his interest to be faithful.

The opposite, however, of this principle is adopted, and oaths are administered upon the most trivial occasions; even a constable is not permitted to conduct a jury to a private room, without being sworn to discharge with fidelity, a duty, which he may be called upon to repeat several times every day during the term. Here the officer is sworn by wholesale and by retail: first being bound by his official oath to perform faithfully *all* the duties of his office, and then being sworn with reference to single acts comprised within those same duties. It is clear that the law here regards the official oath as inefficient; and it is equally obvious that the frequent repetition of that which should be a solemn, religious act, in a hasty and irreverent manner, must have the effect of rendering it wholly inoperative upon the mind of the person whose conduct is intended to be affected by it.

Official oaths should never be administered except to officers of high rank, and they should then be taken publicly, and with due solemnity. There is something imposing in the ceremony of installation, when conducted with proper decorum; and a solemn promise made by an individual under such circumstances, is not only calculated to render him more circumspect in his conduct, but invests him with a sacredness in the eyes of his fellow-citizens, which increases his respectability. But these advantages do not attend the mockery which is daily practiced of privately indorsing an affidavit on the back of a commission, and thus qualifying an officer by a secret act, which neither imposes any restraint upon him, nor attracts any respect from others.

The manner in which oaths are administered in courts of justice has never failed to shock every reflecting mind, which has not been reconciled to this abuse by long habit. Who that has ever entered one of our court-

houses during the trial of a cause, has not experienced a sense of humiliation at the gross impropriety and carelessness with which the sacred volume is treated, and a direct appeal made to the searcher of all hearts? A clerk is seen sitting, perhaps surrounded by half a dozen lawyers and suitors; the counsel engaged in conducting a case are either addressing the jury or examining a witness; a person is called to be sworn, and the clerk without rising reaches out the book to him, and pronounces the oath in a low, hurried tone, which does not reach the ear of the auditory, and is but indistinctly heard by the party to whom it is addressed; and thus in the midst of confusion is a ceremony performed, which is supposed to bind the conscience of a reasonable creature. Sometimes, half a dozen witnesses are sworn at once; one grasps the book, another holds up his hand, a third gazes vacantly at the clerk, who in an awkward endeavor to suit the oath to each, includes parts of several forms, winding up with a familiar nod to one, and the words "so help you God," and to another with "and *you*, as you shall answer to God at the great day," and to a third, "and this you affirm." The witnesses thus prepared to tell the truth, the whole truth, and nothing but the truth, are suffered to mingle again with the crowd, to be called upon at any future hour during the progress of the cause. We cannot imagine a scene more calculated to bring the solemnity of an oath into contempt, and to cause a practical and popular irreverence towards the holy name. This habitual desecration of the oath is the more to be regretted as it is wholly gratuitous, and is a part of a great scene of carelessness and insubordination; all of which is as wrong as it is needless. It is bad policy in every respect to conduct the proceedings of courts in this loose and unbecoming manner. It does not save time nor labor; but on the contrary impedes the progress of business, admits confusion in the place of system, and deprives the proceedings of the court of that order and solemnity which are necessary

to its respectability. It has the direct effect also of lessening the confidence of the public in the purity of the bench; for however upright the judges may be, the looseness with which they administer justice, has an appearance of indifference and callousness, with respect to the solemnities with which the law has surrounded them, which cannot but lower them in the estimation of others.

There can be no two opinions about this matter. The purity of testimony in courts depends, in a great measure, upon the efficacy of the oath upon the mind of the witness; and that oath will be respected or dispised by the careless and the ignorant, in the exact proportion in which they see it treated with contempt or respect by the more intelligent. If the judges are whispering, the clerk sitting, and the lawyers cracking their jokes, during the repetition of the oath, can a bystander be blamed for considering that an idle ceremony, which is thus disregarded by the officers of justice? And will not the habit of swearing in common conversation appear less criminal, and less a breach of good manners, among a people who are in the daily experience of hearing the name of God flipantly and familiarly used, under the immediate sanction of the highest functionaries of the law?

The remedy for this abuse is easy. The oath should be administered with becoming solemnity. The crier should command

silence, the clerk should rise, the business in hand should be for the moment suspended, the judges should give attention, and the oath should be enunciated in an audible voice. The proper respect would then be paid to this rite, which is an appeal to God, which cannot be made innocently, or effectually, unless it be made with reverence. The attention of the spectators would be drawn to the person taking the oath, who would feel the importance of the pledge which he was giving in the presence of his assembled fellow-citizens, and the whole scene would wear an aspect of decorum, which would throw around the court the sanctity properly appertaining to such a tribunal, and without which it can never be either efficient or respectable.

We have not the least doubt that a judicious action on these points by our legislatures and courts, the first reducing the multiplicity of oaths, never requiring them to be administered on trivial occasions, and strictly enjoining that such as might be thought necessary, should be taken in public and with due solemnity, and the latter substituting for the levity which has heretofore attended this branch of judicial duty, a becoming gravity would tend not only to the advancement of justice, but would do much towards purifying public sentiment, in reference to the vulgar and alarming profanity which now disgraces every rank of society in our country.



THE COURT OF APPEALS OF KENTUCKY.

III.

BY JOHN C. DOOLAN OF THE LOUISVILLE, KY. BAR.

WHEN Chief Justice Robinson resigned in 1871, his judicial mantle fell upon the shoulders of a worthy successor in the person of William S. Pryor, who continuously for more than twenty-five years thereafter adorned the Court of Appeals with his learning and virtues.

He received his first commission by appointment of Governor Leslie in September, 1871. At the expiration in August, 1872, of the term for which Chief Justice Robinson had been chosen he was elected for a full term of eight years and subsequently twice re-elected for a like period, his last term expiring January 1, 1897. He held his seat longer than any other man who ever sat in the court, and did more to mold the jurisprudence of the state than any other judge in the last fifty years. He was four times chief justice—1871–1872, 1878–1880, 1886–1888 and 1895–1897. He was the first Chief Justice of the court as reorganized on January 1, 1895, under the fourth constitution of the state and by his experience he was enabled without friction to so adjust the court in its division into sections as to greatly expedite the transaction of the

vast amount of business accumulated before it.

In addition to his twenty-five years of service in the Court of Appeals, Judge Pryor was for more than five years a judge of the Circuit Court.



WILLIAM S. PRYOR.

He was the candidate of the Democratic party for reelection in November, 1896, but he could not stem the tide of opposition to his party in that year and he was defeated by the Republican candidate, Hon. A. R. Burnam. His retirement from the bench gave rise to the most sincere regret throughout the whole State.

Immediately afterwards he took up the practice of law in Frankfort before the court over which he had so long presided. His private fortune had suffered greatly

during his long term of judicial service, but when he resumed the practice retainers came from every part of the State. It is safe to say that no lawyer in Kentucky has been in the last three years engaged in more important cases or in a greater number of them in the Court of Appeals.

Judge Pryor was born in Henry County, Kentucky, on April 1, 1825. He still has

his home within a mile of his birthplace. His early life and training have given him an erect frame and a commanding physique that betoken the vigorous mind and the upright life by which his judicial career was ever marked. He left the bench with a record in all respects, "like Cæsar's wife, above suspicion."

It would be impossible in this article to review even a small proportion of the important cases in which Judge Pryor delivered the opinion of the court.

His independence of thought and his logical vigor are perhaps fully illustrated by his dissenting opinion in what is known as "The World's Fair Case," reported as *Norman v. Kentucky Board of Managers of World's Columbia Exposition* (93 Kentucky, 555-578). In that case the validity of an appropriation in aid of Kentucky's exhibit at the World's Fair in 1893 was attacked on the ground that the bill had not been properly passed through the two Houses of the Legislature. The majority of the court held the act void on that ground but Judge Pryor in a strong dissent made a masterly review of principles and authorities and maintained that the court could not go behind the enrolled bill attested by the proper officers of the Legislative department, but must accept their authentication as conclusive on all questions upon the passage of a law.

Every lawyer knows what expansion has taken place in the law since the Civil War. In every phase of that development Judge Pryor has shared.

Thirty volumes of Kentucky Reports (8 Bush to 100 Kentucky) record his decisions and of the whole series Judge Pryor can truthfully say "*quorum magna pars fui*."

The discussion of the virtues and excellencies of the living seems always to be of questionable taste. Especially is this true, when the writer acknowledges a strong personal bias and a warmth of admiration that

personal contact with Judge Pryor always gives. One cannot know him in his private and in his public life without feeling that he has elements of strength and leadership, given to but few men. His influence upon the court with which he was so long connected has made for that equal and even-handed justice that gives to each his due without fear or favor.

M. R. HARDIN.

Judge Mordecai Robert Hardin—better known among his contemporaries as Judge "Bob" Hardin—was one of the most popular men that ever sat in the Court of Appeals. He was a member of the prominent Hardin family that has given to Kentucky so many of its most eminent citizens. He was born in Washington County on August 7, 1825, and after filling the office of commonwealth's attorney for his district with great credit to himself, he was when forty-one years of age, elected judge of the Court of Appeals to succeed the venerable Chief Justice, Thomas A. Marshall.

He served a full term of eight years, being Chief Justice of the court from 1872 to 1874. After his term expired he removed to Louisville and resumed the practice of law, but he died a few months later on January 3, 1875. Though less than fifty years old, he had enjoyed the highest judicial honors of the State. His many and varied talents commanded the admiration and respect of all who knew him.

Judge Hardin was a man of most attractive personality. He had a rare fund of humor, and the uniform courtesy of a gentleman "to the manner born" made him a most agreeable companion.

Numerous anecdotes are told of him, while on the bench. On one occasion a case was called on the docket for argument, when a man of untidy dress arose and addressed the court. He stated that he was a lawyer, though absolutely unknown to the court and to every other man in the room,

and perhaps unheard of by them all. He asked to be sworn in as a member of the bar on his own motion and allowed to argue his case. Chief Justice Pryor, then presiding, hesitated because of the man's appearance when Judge Hardin with kindly humor leaned over and suggested that the man be allowed to argue the case, and if the court then thought him a lawyer he might be sworn in later. Permission having been given, the stranger proceeded with a most able and convincing argument, and when he concluded Judge Hardin said, "Pryor, we'll have to let him be sworn in."

On another occasion, the case of *Cook v. College of Physicians and Surgeons*, reported in 9 Buch. 531 (since become a leading case on the subject of mandamus to a private corporation), was being most exhaustively argued by able counsel. The argument had already consumed two days and the court had

adjourned until the next morning. After the adjournment some of the interested counsel met Judge Hardin at the train on his way to Louisville. When asked if he would return in time to hear the conclusion on the next day, the Judge replied with a twinkle in his eye, "I don't know whether I can get back or not. The court has heard the lawyers for two days and as yet has not been able to find out what was done to Cook, and they have sent me down

to Louisville to learn if I can what he is complaining about."

Judge Hardin left the bench a poor man, and his death a few months later, put to the test those traits of vigor and self-reliance that he had transmitted to his descendants. His daughter, Miss Pauline Helm Hardin, has been for two years State Librarian of Kentucky, and she has drawn to herself all the friends that so warmly admired her honored father.



WILLIAM LINDSAY.

WILLIAM LINDSAY.

The retirement of Chief Justice Hardin made Judge Peters for the second time Chief Justice of the Court. When he left the bench in 1876, Judge William Lindsay became Chief Justice for two years from August, 1876, to August, 1878. He had previously been for six years Associate Judge of the Court by virtue of his election in August, 1870, for a full term of eight years.

William Lindsay was born in Rock-

bridge County, Virginia, on September 4, 1835. He is a big, brainy representative of the Scotch-Irish stock which settled what is known as the "Valley of Virginia." He was educated in the schools of Lexington, the county seat of his native county, and in 1854 he removed to Hickman County in the extreme southwestern part of Kentucky. He studied law under private instruction and was admitted to the bar in 1858. When the Civil War broke out, he entered the Confed-

erate Army and served with distinction to the close of the war in 1865.

After his return from the army, he resumed the practice of the law in his old home and in 1867 he represented his district in the State Senate. While filling this office, he was nominated by the Democrats and in August, 1870, elected Judge of the Court of Appeals.

Prior to his election to the bench, Judge Lindsay was not widely known outside of his immediate district but when he took his seat he immediately showed himself to be a Judge of the highest order. No other man in Kentucky in so short a time ever established such a reputation as profound jurist and able lawyer. His opinions reported in volumes 7 to 14 of Bush's Reports are widely quoted as authority, and the Supreme Court of the United States has time and again rested its decisions upon the reasoning of Judge Lindsay's opinions.

One instance of this may be cited. In the case of *Douglass v. Cline*, (12 Bush. 608), Judge Lindsay, in delivering the opinion of the court, for the first time, laid down the doctrine that in a suit to enforce a mortgage lien upon a railroad and for the appointment of a receiver to impound the earnings pending the suit, a Court of Equity in its discretion might annex conditions to the granting of a receivership, such as requiring the payment of back wages to employes or of certain claims for materials and supplies. The doctrine of this case is the foundation of the "six months rule" in receivership cases laid down nearly two years later in *Fosdick v. Schall* (96 U. S. 335), and since then repeatedly followed by that court and the other courts of the country. When first laid down it attracted widespread attention and startled some lawyers by what was regarded as its radical displacement of contract liens.

It is said of the Hon. Edward J. Phelps of Vermont that soon after the deplorable

killing of Judge John M. Elliott of the Kentucky Court of Appeals (hereafter mentioned) he was arguing in a Vermont Court a suit for the foreclosure of a railroad mortgage. The case of *Douglass v. Cline*, (12 Bush. 608), was cited as an authority by opposing counsel. Mr. Phelps had never heard of the case, and he asked time to consider it. The next morning he took up his argument, stating that he had read the Kentucky case, that it seemed to be exactly in point and the only observation he could make on it was that he now understood why they shot Judges in Kentucky. Despite these facetious remarks of Mr. Phelps the doctrine of *Douglass v. Cline* is now a part of the settled law of the land.

Judge Lindsay after his retirement from the bench located in Frankfort for the practice of law. It is said that for years he enjoyed the most lucrative practice of any lawyer in Kentucky. He again served in the State Senate and was a leading member of the convention that framed the present State Constitution. When Senator John G. Carlisle was appointed, by President Cleveland, Secretary of the Treasury in March, 1893, Judge Lindsay was chosen as his successor by the Legislature of the State. When his term expired in March, 1895, he was again elected for a full term of six years.

In the summer of 1892, Judge Lindsay was made one of the World's Fair Commissioners, and in the same year President Harrison appointed him a member of the Inter-State Commerce Commission. The appointment was promptly confirmed by the Senate but Judge Lindsay declined to accept it.

In 1896, when the split in the Democratic party over the currency question occurred, Judge Lindsay allied himself with the "Gold Democrats" and took a prominent part in the Convention at Indianapolis that nominated Generals Palmer and Buckner. In the campaign that followed he made many ef-

fective speeches for the "Sound-money cause" and his course cost him his reelection to the Senate the second time.

During his period of service in the United States Senate he has enjoyed the respect of the whole country, and in the discussion of all public questions he has taken an active and influential part.

At the meeting of the American Bar Association in 1899, Judge Lindsay was selected to deliver the principal address. His masterly discussion of the Philippine question and the policy of expansion commanded great admiration and through him reflected great credit upon the State.

M. H. COFER.

After the term of Chief Justice Lindsay expired in August, 1878, Judge W. S. Pryor for the second time became Chief Justice for two years. At the end of that time Judge Martin Hardin Cofer who had been elected in August, 1874, for a full term, came to the Chief Justiceship.

Judge Cofer was born in Hardin County, Kentucky, on April 1, 1832. His parents were persons of limited means though of excellent family. A fine legal mind was his right by inheritance, because he was descended from a family that has given Kentucky many of its foremost lawyers and statesmen. He was a namesake and relative of General Martin D. Hardin who was held in such universal esteem as a lawyer and as a man that upon his death in 1823 the Court of Appeals and the members of its bar resolved as a tribute to his virtues and integrity, to "go into mourning and wear crape on the left arm for thirty days" and also to "attend his funeral in procession."

Early in life the future Chief Justice was thrown upon his own resources and forced to earn a living by teaching school, while trying to complete his own education. For a short time he was County Surveyor of his own county. In 1853 he married and re-

moved to Illinois. In 1856 he was licensed in that State to practice law and in the same year he returned to Kentucky. For a while he edited a local paper in Elizabethtown, Kentucky, while practicing his profession. When hostilities between the North and the South commenced he went South and joining the Sixth Kentucky Regiment of the Confederate forces, he remained with it until August, 1864. He was severely wounded in the battle of Shiloh and was promoted to the rank of Colonel for bravery on the field of battle.

After the war he was in 1870 appointed Circuit Judge for his circuit to fill a vacancy in that office. He continued to hold the position through elections by the people until he was promoted to the Court of Appeals bench.

His death which occurred on May 22, 1881, while he was in office was regarded as a great public calamity. He was a clear, vigorous thinker with a natural turn for the law, and his opinions evince a depth of reasoning and a knowledge of fundamental principles that made him one of the best judges of the court. He was known as a safe and able judge, whose services to the State could poorly be spared.

JOSEPH H. LEWIS.

In the month of August following the death of Chief Justice Cofer, an election was held to fill the vacancy, and General Joseph H. Lewis, of "Orphan's Brigade" fame was chosen for the place. He assumed the duties of Chief Justice on September 1, 1881, and he was reelected in August 1882, and again in August, 1890. When his last term expired, he declined to offer for reelection. He served, in all, seventeen years in the Court of Appeals and prior to that he had served one year as Circuit Judge.

Judge Lewis was born in Barren County, Kentucky, on October 29, 1824. He is still living in the enjoyment of the ripened honors of his long and useful life. His

father was a man of wealth and the son was educated in Centre College, an institution of learning that has given many famous men to Kentucky and all the central and southern part of the country.

He graduated in 1843, studied law and was admitted to the bar when twenty-one years of age. He represented his county in the State Legislature several times and when the Civil War broke out he was made Colonel of the Confederate Regiment in which Chief Justice Cofer served. In 1864 he was commissioned Brigadier General to succeed Gen. Roger Hanson in command of the brigade then and since known as the "Orphan's Brigade." This name was given to his command because of the fearful loss of life among officers and men which it sustained in many of the bloodiest battles of the war.

Gen. Lewis's command of this famous brigade gave him a hold on the affections of his men that made his candidacy for an office equivalent to an election. He is a man of great firmness of character and an unfaltering adherence to what he believes to be right. Hence his natural ambition led him to seek judicial preferment.

In the highest court of the State he proved himself a jurist of high rank, whose opinions are worthy to be classed with those of the other eminent men who have sat in the court.

JOHN M. ELLIOTT AND THOMAS F. HARGIS.

When Chief Justice Peters voluntarily retired from the Court of Appeals in August, 1876, John M. Elliott was chosen to succeed him. Judge Elliott entered upon the duties of his office and continued to discharge them with fidelity and with credit to himself and to the State until March 26, 1879, when he was shot down in cold blood by an insane and disappointed litigant.

The event shocked the civilized world, as it is said that modern history mentions but one parallel case—that of Sir George Lockhart, President of the Court of Sessions in

Edinburgh, who was assassinated in like manner in 1689. The bar of the State and the Court of Appeals, at a meeting held April 8, 1879, adopted resolutions attesting "the integrity, dignity, impartiality, love of justice and strong common sense which marked his character as a judge and a man."

At a special election called for May 12, 1879, Thomas F. Hargis, formerly associated in practice with Judge Elliott, was chosen to fill out his unexpired term. As a result of that election, Judge Hargis in August, 1882, became Chief Justice of the court for two years.

Judge Hargis was born in Breathitt County, Kentucky, on June 24, 1842. He is emphatically a self made man. When the war between the States began, he joined the Confederate Army and served throughout the war with credit. At its close he turned his attention to the law. He served his people in various capacities, as State Senator, as County Judge and as Circuit Judge prior to his election as Judge of the Court of Appeals.

At the expiration of his term of office he removed with his family to Louisville, where he has ever since been engaged in the practice of law.

THOMAS H. HINES.

Thomas Henry Hines was born in Butler County, Kentucky, on October 9, 1838, and he died in Frankfort, Kentucky, in January, 1898. His family is one of the oldest in the State and numbers many of its most prominent citizens in both public and private life.

His early training developed in him those strong qualities of self-reliance and that utter absence of fear which made him peculiarly fitted to be a leader of men. When a mere boy he became a professor in a college at La Grange, Kentucky, where he remained until the breaking out of the war, when he joined the Confederate Army. His gallantry and calm intrepid courage made him famous

before he was twenty-three years old. It was at that age he planned and carried into execution his daring scheme for the escape of his leader, Gen. John H. Morgan, and others, including himself, from the penitentiary at Columbus, Ohio, where they were all confined as prisoners of war. The details of the ingenious plan and the boldness of its execution have excited the widest admiration for the master mind that made possible its success.

Young Hines had not been long incarcerated in the prison before he observed the freedom of the cells from dampness, and rightly judged that there must be an air chamber beneath them communicating with the outer world. His reading of Victor Hugo's book, "*Les Misérables*," suggested this to him as a means of escape. He made known his plan to his companions and all set to work as secretly as possible to cut through the floor to the supposed air chamber. It was finally reached and plans for escape agreed upon.

A dark, rainy night was selected, and when the prisoners finally emerged from the building they found themselves still within the prison enclosure and almost in reach of armed guards with vicious watch-dogs. Stealthily and safely they scaled the outer wall by means which Hines's ingenuity had provided, and soon they had eluded the vigilance of the officers and were safe within Confederate lines.

The escape, including as it did the rescue of Gen. Morgan, so worshiped by his men and so dreaded by his enemies, excited the greatest sensation at the time. For this and other gallant exploits, Hines was made a Captain.

After the war Captain Hines returned to Bowling Green, Kentucky, and took up the practice of law. He was elected Judge of the Warren County Court, but he resigned

to attend to his private practice. In 1878, when Chief Justice Lindsay's term of office expired, a convention of the Democratic party was called to nominate his successor. There were two leading candidates before the convention, neither of whom could control it. Capt. Hines had not been a candidate, but in the ensuing deadlock he was proposed as a compromise candidate, and such was his personal popularity that he was nominated and elected by a very large



THOMAS H. HINES.

vote. He at once entered upon the duties of his position and soon fully realized all the predictions of his friends. As was expected, he proved himself a learned and conscientious judge, whose native ability and great force of character marked his entire judicial career.

Only the ravages of ill health prevented him from retaining the office indefinitely and making for himself a record equal to any of his predecessors.

From August 1884 to August 1886, he

was Chief Justice of the court. When his term of office expired, he was not a candidate for reelection, but went abroad for a year in search of health. Upon his return he took up the practice of law before the Court of Appeals, where he appeared in many important cases up to the time of his death.

WILLIAM H. HOLT.

William H. Holt was elected a Judge of the Court of Appeals in August, 1884, from the eastern district of the State, and he became Chief Justice for the last two years of his term, 1890-1892. He is a Republican in politics and he was the first Republican, after the Civil war, to sit in the court. He had not long been a member of the court when he showed himself free from partisanship and political bias. When his term expired, he had established a reputation for ability and integrity that led many lawyers throughout the State, regardless of politics, to support him for reelection. The year 1892 was, however, a Democratic year, and he was defeated by the present Chief Justice, James H. Hazelrigg. The strength that Judge Holt developed against his able and popular antagonist is sufficient evidence of the esteem in which he was held by the voters of his district and by the bar of the State.

Judge Holt was born in Bath County, Kentucky, on November 29, 1842. He graduated in law at the Albany Law School in May, 1863. In June, 1863, he commenced the practice in Mt. Sterling, Kentucky, and he soon took high rank at the bar. His career as a lawyer has been most successful. When he was defeated for reelection he continued to reside in Frankfort, where he is still engaged in the active work of his profession. He is retained in a large number of cases before the Court of Appeals—especially in those cases appealed from the eastern section of the State.

CASWELL BENNETT.

Caswell Bennett, Judge of the Kentucky Court of Appeals from August, 1886, to his death on August 9, 1894, was born in Halifax County, Virginia, on August 27, 1836. He received a liberal education and had as his preceptor in law Judge Joseph R. Underwood, already mentioned as a Judge of the Court of Appeals with Chief Justice Robertson.

He was admitted to the bar in 1857 and he practiced with success until 1867, when he was elected Circuit Judge—an office which he held for twelve years. In 1878 he was a candidate for Judge of the Court of Appeals to succeed Judge Lindsay, but he was defeated by Judge Hines. At the expiration of Judge Hines's term he again became a candidate, and this time he was elected.

His term of office would have expired on January 1, 1895, and he was the candidate of the Democratic party for reelection, with certain prospects of success, when his sudden and untimely death occurred.

For two years he was Chief Justice of the court. His associates on the bench said of him, "As a man, he was upright, fearless, true to his convictions and impatient of wrong or injustice; as a friend he was loyal to a fault; as a lawyer, careful, wary and resourceful, and as a judge, patient, learned, industrious and intrepid."

I. M. QUIGLEY.

Upon the death of Chief Justice Bennett, Governor John Young Brown, on August 13, 1894, commissioned Isaac Moore Quigley of Paducah, Kentucky, to fill the vacancy. He at once qualified and in the discharge of his duties presided over the court a little more than three months. With such associates as Judges Pryor, Lewis and Hazelrigg, Chief Justice Quigley had little opportunity in three months to prove his ability as a jurist.

He was born on March 5, 1856, and before his elevation to the bench he had sig-

nalized himself by serving two terms in the lower house of the Kentucky Legislature, and had taken rank as a lawyer. He has for several years been a partner of his honored father and his law firm has engaged a large

practice in the most important cases at the Paducah bar.

He was succeeded on the bench on January 1, 1895, by Judge John R. Grace.

LYNCH LAW.

BY O. F. HERSHEY OF THE MARYLAND BAR.

EACH successive lynching in America brings forth appropriate editorial outcries and arouses the public censors to prompt and vigorous lamentation; but the community at large, even in its most inclusive sense, does not appear to regard the crime with any deep-going or abiding shame or horror. In the last ten years nearly 2,000 persons have been lynched in the United States—a number exceeding the legal executions by nearly fifty per cent, yet it is an astonishing fact that less than a dozen lynchers have ever been tried for their crime and only one or two have been punished, and that of the hundreds of rewards for lynchers offered by virtuous governors, sworn to uphold the law, none have ever been paid; nor has any lyncher ever lost caste or character in his community.

The truth of these sweeping statements has been strictly confirmed by a study of several communities guilty of four of the most outrageous lynchings during the last two years. In three of these cases white men were lynched, two of whom had already been condemned to be hung, while the other had admitted his guilt. The law had interposed no delays, having been in fact unusually swift and sure. Public feeling aroused by the criminal act had entirely subsided and there was no outraged husband or father calling for revenge, nor was there any race feeling. Nevertheless the victims were taken *vi et armis*, by citizens

in good standing and brutally lynched. The press was duly shocked and the community was prompt with interviews, resolutions and rewards, but not the slightest real effort was made to punish the lynchers. These lynchings took place in law abiding communities composed of the best types of American citizenship; and yet personal interviews with different classes of the community—men and women of high birth, professional men, farmers, even ministers—failed to disclose any real horror. The sentiment of all classes appeared to be simply that a worthless man had met a just death. Everybody admitted that lynching was criminal, but they seemed to regard it not as a crime against society, but as a crime against the individual, and as the individuals in question were of no consequence, they claimed the crime was of no consequence. The indifference of all classes was palpable; an elopement or successful burglary would have created more excitement. It may be remarked in passing that this indifference is by no means confined to the South, for several of the most deplorable of recent lynchings took place in two of the most civilized communities of the middle west; one in a town having a dozen churches, excellent private and public schools, a public library, a university and a citizenship imbued with the best traditions of transplanted puritanism; here too, no serious effort was made to vindicate the law. The truth is

this indifference is so widespread and so generally acknowledged that there would be no excuse for even its mention, if it were not that in its analysis may possibly be found the cause and cure for lynching.

It is doubtful whether we appreciate the real causes of this crime which Prof. Bryce justly characterizes as a reproach to our civilization; and until we do our remedies are likely to remain in the air. It is not sufficient to attribute lynching to mob rule, emotional insanity of the crowd, race hatred, contempt for the "niggers," loss of self control, intense community feeling, vivid hatred of crime, *lex talionis* and the like. It may be true that courts are slow, uncertain and unduly sympathetic to the rights of the accused; that corrupt jurymen, shrewd lawyers, the technicalities of the law or the undue sympathies of the pardoning powers, may often prolong and save a guilty person's life; but it is extremely doubtful whether Judge Lynch ever was influenced by any fears inspired by these facts. These customary explanations of lynchings have no doubt a certain validity in each case, but the fundamental explanation goes deeper. These free born men of the South and West lynch because they believe they have the right to do so. This popular perversion is due apparently to the gradual development of a distinct and peculiar American attitude or spirit of the masses towards those institutions we can best call "The Law." The Europeans never lynch, not because they are more civilized or more law abiding than the farmers of Maryland and Illinois, but because their attitude towards law is different; they are influenced and governed by a different *esprit des Lois*, and as Montesquieu long ago pointed out it is this attitude or spirit of the community which give laws their effectiveness and their sanction.

Using the term law in the comprehensive sense of the schools of Bentham and Hobbes, it need hardly be said that historically our attitude or spirit towards it has been the

same as the English. Prof. Dicey's "Rule of Law" has been the key to American as well as to English institutions; but every student of our institutions must have observed that the spirit and temper of the people towards law and government and the powers that be has been gradually changing, and that we have been developing and have developed what may reasonably be called a distinctive American "Spirit of Law" as distinguished from the English, French or German spirit. Law meant something different to the early Southern planter, from what it means to his grandson: it was more of a force, power, institution, reality to him. The rule of law today is as solemn and serious an actuality to an Englishman as is Her Majesty the Queen, or the law of gravitation or the certainty of an hereafter; law in its institutional sense is as much a predetermined factor in his daily affairs as is one of the laws of nature. All his business ventures and daily affairs presuppose the rule of law. This too is our traditional attitude, but our real attitude has changed; we outwit, defy, avoid and forget the law; we make our own laws, therefore, in certain cases, we feel unconsciously that we can be a law unto ourselves. So long as English traditions and the English spirit or notion of the law prevailed with us lynchings were unknown; but in the South and West, and for that matter in the North and East, the masses no longer unconsciously reverence and fear the law as their fathers did; they feel that they are the law; they make it, they can unmake it. In lynching an enemy of society they do not mean to violate or despise the law, but rather to vindicate and enthrone it. They are acting simply in their sovereign capacity as lawmakers. Laws seems to them local in their origin, therefore local in their application and in their breach; law to them is no longer an institution dominating the community—the community is the law. The right to lynch partakes as much of the nature of law to them

as the right of self defense, and we actually have as the result a recognized public sentiment which it is not entirely absurd to call "lynch law." This is the philosophy by which lynching thrives—especially in the South where the spirit of individual liberty and individual license has always been keener than elsewhere; and not only is this the state of mind of those who lynch, but consciously or unconsciously it is that of those who look on and are silent. In a large sense this spirit or temper is possibly a realization of what the prophets of Democracy foretold. The Demos is becoming self conscious. Democracy is growing to be less a form of government and more a slogan of liberty. So far, pure Democracy or the Democracy of Rousseau, or of the philosophic Anarchist, has been lost in representative government, but latterly one notes a tendency especially in the South, to revert to this more primitive notion of government. While the town meeting, for example, is dying out in New England, the township and the village government are becoming popular in the South. And even in the North, the same tendency is noticeable in the growing propaganda for the Referendum, Home Rule, and the various forms of Socialism. With the development of this more primitive Democracy the right to govern and the right to punish without any intermediary institutions become equally vivid conceptions. A crime against society becomes a crime against the individual and arouses his sense of self defense and self preservation; he no longer looks to the appointed officers of the law for protection, but becomes in his own estimation an officer of the law himself, until consciously or unconsciously he comes to regard lynching as one of his sacred and inalienable rights; the power to lynch inspires in him a belief in the right to lynch.

If there is any truth in these conclusions then it is obvious that successful remedial legislation cannot be expected from commu-

nities given over to lynching or which are indifferent to it. The State Legislatures can pass anti-lynch laws, but there will be no one to enforce them, for as we have seen, no law can be effective without the sanction and support of a strong community spirit. Our notions of government and our attitude towards law may be in a transitional stage, and time and education may work a cure, but the people are not likely to appreciate the enormity of the crime of lynching until punishment sure, swift, and inevitable is visited upon the lynchers and those aiding and abetting them. The law will not be respected until it asserts its power to punish. This punishment will not come from the guilty community, for those who lynch will not punish themselves, and no state will enforce laws that the great mass of the people do not want enforced. If the States cannot cope with the situation then the powers of the Nation should be invoked. Congress should be empowered to pass a law making all who lynch and all who instigate, aid, abet or shield lynchers, guilty of a crime against the United States. This law would be enforced. A few United States marshals and detectives could in a week discover the guilty ones and place them behind the bars of a Federal prison. It is as easy to discover a lyncher as a moonshiner, and it is of infinitely more importance that he should be discovered and punished. If the object of our constitution is to insure domestic tranquility, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, it ought to include the power to punish those who defy the State, and take life without due process of law. If it was worth while to amend the constitution to prevent the denial of the right to vote, it is also worth while to amend it to prevent and punish the denial of justice.

There is much to be said in favor of a Federal law. In the first place, the crime is national in its importance; in the eyes of the world lynching is a reproach not so much on

the community in which it occurs as on the nation at large, on our civilization and our form of government. It should be the right, as it is the duty, of the nation to vindicate itself. Then, too, the Federal power is best fitted to mete out punishment; no jury of the vicinage will ever convict their neighbors for lynching. They cannot differentiate lynching as a crime from lynching as a just punishment. Public sentiment is not sufficiently opposed to lynching in the concrete, however much it may declaim against it in the abstract. When the anti-lynching law was before the Legislature of Georgia last year, a prominent member expressed the sentiment of that honorable body as follows: "I think the Government is wasting effort trying to create a popular sentiment against lynching when a woman has been assaulted. It is love's labor lost; for lynching is inevitable so long as the crime which provokes it is committed. All laws on that line put on the statute books fall still born and are dead before they are promulgated. I say this because it is true." This confusion of ideas concerning lynching as a just punishment in any particular instance, and lynching as a crime against society, is very common throughout the South; but it is a vital confusion and one that cannot be removed until law is recognized as King.

One reason why the rule of law is not the force in this country that it is in Europe is because the local instruments of the law are not respected. A European respects the officers of the law as implicitly as an Englishman worships a duke. Not so with us. No man stands in awe of the judge or district attorney or constable whom he helped

to elect; who can bow in reverence to a constable or a justice of the peace—the only representatives of the great institution we call "The Law," with which many of our lynching brothers come in contact. Many of the public representatives of law and order are not even respectable; sheriffs, legislators, attorneys, judges are often men of the greatest mediocrity; the public has no respect for law. This fact helps to explain the change of the American spirit towards law and demonstrates the necessity of invoking some power to punish that will be respected because it must be respected.

The effect of bringing the power of the Federal Government home to the people will do more to root out lynching and the indifference to lynching, than a century of editorial homiletics. Continental countries are free from lynchings because the strong arm of the law is omnipresent; the soldiery and constabulary are to be found, or at least are often seen in the remotest hamlet. The attitude of the public towards law and its breaches is fixed; punishment is swift and certain. In many sections of our country the people never come in touch with the Federal Government except to buy its postage stamps; they never see its law officers, its soldiers, or its marshals; to them the justice of the peace and the county jailor are sole representatives of law and order. Little wonder that lynching seems to them a right rather than a crime. Let the Federal Government step in and say thou shalt not lynch as it has said thou shalt not counterfeit or moonshine nor interfere with the mail, and a wholesome change will take place at once.

THE COURT AND BAR OF COLONIAL VIRGINIA.

BY BUSHROD C. WASHINGTON.

TO the antiquities and archives of "The Old Dominion," the Colony and Commonwealth of Virginia, surnamed "The Mother of States and Statesmen," the antiquarian and historian instinctively turn to discover the earliest facts concerning the first English settlement in the Western Hemisphere, and the incidents following, which brought to birth the American Republic.

The needs of trade, which made desirable a northwestern route to India, incited the spirit of discovery which resulted in the great find of Christopher Columbus under the auspices of Ferdinand and Isabella of Spain. To the Spaniard, therefore, the world is indebted for that new lease upon its life acquired by the discovery of its other and as we think better half.

It was for the Anglo-Saxon, however, to follow in his wake, and planting his standard upon the Northern Continent, to dominate it with that civilization, expressed in the general term, "British Institutions."

Chief among these was that safeguard to the rights of humanity embodied in the statutory and common laws of England, affirmed and secured in *Magna Charta*.

Accompanied as it was by the Christian religion, and that with the minimum of dogma at that time possible, this priceless inheritance of Englishmen was first transferred to the New World with the colony founded at Jamestown, Virginia.

The principles of civil and religious liberty, fettered for a time by the restraints of European surroundings, where still was revered "the divine right of kings," introduced to the pure environment of a new world, became an irresistible force in establishing and protecting the *yet diviner rights of man*.

But if to the Spaniard is accredited the discovery of the continent, and to the Englishman the introduction of Anglo-Saxon blood and civilization into it, it remained for the American, upon the soil of Virginia, to formulate and present to the world the *first written constitution* for a commonwealth of *free people*.¹

It was this trinity of events that made possible our country and its unique social order.

While the commonwealth of Virginia was imperial in the reaches of her domain, in variety of climate and soil, in wealth of forestry and mine, in rivers and harbors, and all that land and water yield as contributions to the material prosperity of a State, while from her ample bosom, as a largess to the Nation, she donated territory from which was created four great States and part of the District, the seat of the national government, it is not in these that she laid claim to greatness. Her wealth and pride has ever been her people.

It is not the elements of material wealth and power alone that constitute a State, but *men*, — "men who know their rights and knowing dare maintain."

Of such were the statesmen, jurists and soldiers upon whom the ancient colony and the later Commonwealth relied in every emergency, and they never failed her. Notable among them were those, who, learned in the principles of law, and conversant with the ancient charters, may be said to have composed the Bar of Colonial Virginia.

Heredity and environment, those prime factors in the development of men, united

¹ The Declaration of Rights and Constitution of Virginia, which by unanimous vote passed the Virginia House of Burgesses, June 29, 1776, after which the Declaration of Independence is said to have been modeled.

happily in moulding the men of our country in the colonial and Revolutionary era, and nowhere more so than in Virginia.

Of all the colonies, Virginia retained with least innovation the social and political characteristics of the mother country, and of them all was most loyal to the Crown, until forced away by repeated acts of tyranny and usurpation. The activities of her people being directed chiefly to agriculture, she was less in conflict with British interests than were the northern colonies, through their maritime competitions.

The common law of England was adopted by Virginia as far as practicable under the differing conditions. The Church of England was the established church of the colony until laws for religious freedom were enacted. The laws of primo-geniture and entail obtained; the prestige of landed proprietors was recognized and fostered. The education of the sons of the wealthy was often completed in England, those preferring the law, at the Inns of Court, Oxford and Cambridge.

The late Hon. Hugh Blair Griggsby, a distinguished authority upon American history, and the best upon Virginia antiquities, said, in an address before the alumni at William and Mary College, July 3, 1855, referring to the close relation of Virginia to the mother country, "some of the most intelligent statesmen of the colony regarded Virginia as occupying the same relation to the British Crown as was borne by Scotland before the union of that country with England, and holding the King as the common bond; a doctrine which would seem to be sustained by the arms of the colony, on which were quartered those of England, Scotland and Ireland, with the motto: '*En dat Virginia quartam.*'" Mr. Jefferson and Mr. Wythe are mentioned as having held this opinion, which is corroborated as to Mr. Jefferson in his memoirs.

It adds to the honor of Virginia that, being thus closely connected with England,

she was the first to give impulse to the American colonies in resisting the British Stamp Act by the resolution in her House of Burgesses in 1765, and that thenceforward she took the lead in the Revolutionary movement until the surrender of Cornwallis at Yorktown. The Revolution may thus be said to have begun and ended upon her soil.

In forming a just estimate of men, the history of their achievements and the processes of their development are a more infallible guide than a mere description of their personality.

The readers of the Green Bag are already familiar with most of the great lawyers of Virginia who flourished in the later years of the colony and the early period of the commonwealth, through pen portraits of them in the excellent articles by Sallie E. Marshall Hardy. The writer will therefore devote this article mainly to the times, conditions and institutions that developed them.

It has been said by an eminent authority that "the laws of a country are necessarily connected with everything belonging to the people of it, so that a thorough knowledge of them and of their progress would inform us of everything most useful to be known about them." If so much is true as to the laws of a country, a sketch of the Civil Courts and of the law-making bodies must also be of comparative interest.

The charter of the London company under letters patent of the King of England, of date April 10, 1606, under which the first American colony was established, and the first settlement located, by Captain John Smith, at Jamestown, Virginia, on the 13th of May, 1607, vested in the chartered company all powers, legislative, executive and judicial for the colony. These were to be exercised, that is, the executive and judicial functions, chiefly by the "Governor and Council," who were also members of, and elected by the House of Burgesses. According to Stith in his history, the first Assembly ever

¹ Priestley, as quoted in preface of Hening's Statutes.

held in Virginia, was called by George Yeardley, then Governor, in June, 1619. Counties not being then laid off, the representatives of the people were elected by townships; the boroughs of James Town, Henrico, Bermuda Hundred and others, sending their members to the Assembly, from which circumstance, the lower house was first called the House of Burgesses.¹

The body known as the "Governor and Council" on its judicial side was the first Civil Court established in America. It had original jurisdiction in all cases and its judgments seem to have been final. The Governor and Council also exercised the power of establishing Inferior Courts, as witness the following quaint commission:

To whom all these presents shall come. I, John Pott, Esq., Governor and Captaine Generall, send greeting in our Lord God everlasting. Whereas for the greater case of the inhabitants of dyverse parts of this Colony, and for the better Conservation of the peace, and due execution of such laws and orders, as are, or shall be established for the government of the people and the inhabitants in the same, the Governor and the Councill have thought fitt, and accordingly appointed by an order of the Cort made the 7th daie of March, last past, that there shall be monthly corts held and kepte in some of the more remote plantations thereof: now know ye that according to said order, these persons whose names are here inserted are for the tyme being assigned and appointed to be the present commissioners of and for the holding and keeping monthly corts within the Corporation of Elizabeth Citty and the parts near adjoining, viz: Capt. Thomas Purfury, Capt. Edward Waters, Lieutenant Thomas Willoughby, Lieutenant George Thompson, Mr. Adam Thoroughgood, Mr. Lyonel Coulston, Mr. William Kemp and Mr. John Downman; which said Commissioners or any three of them, whereof Capt. Thomas Purfury and Lieut. Edward Waters always to be one, shall have power & authority to heere and determine all such suits and controversies between party and party as exceed not the value of one hundred pounds of tobacco: especially

that they take into their care, the conservation of the peace, the quiet government and safety of the people there residing or being, and that all orders and proclamations bee kepte and observed, and according to the same to inflict a punishment upon all delinquents either by fine or otherwise (such offences only excepted as concerne the taking away of life or member). Provided alwise, that it shall be lawful for the plaintiff or defendant in any suit before the said Commissioners depending to appeal to the Cort at James City, there holden by the Governor and Council, and they are required to keepe records. . . .

Given at James Citty, the 20th day of March, Anno Dom. 1628-9, and in the reign of our sovereign lord *Charles*, by the grace of God of England, Scotland, France and Ireland, Defender of the Faith, &c., and in the two and twentieth year of this plantation.

A like commission was issued the same day, to sundry other commissioners, for holding monthly courts, "in the upper partes," referring evidently to the section of country west and remote from James City.

According to Hening, "it was early a leading principle, *to carry justice to the doors of the inhabitants.*" For this object these courts in some of the distant counties had final jurisdiction as far as three thousand pounds of tobacco, and in sparsely settled plantations, single individuals were invested with the full powers of a County Court.

These monthly courts were therefore the first lower *Courts of Record*, and the Governor and Council the first Court of Appeals known in the history of the colony.

There was no appeal from the Courts of the colony to any higher tribunal in England. On the other hand, the acts of the Colonial Assembly were subject to ratification of a Council of the chartered company in England before they became operative, and the Governor and officers of the Assembly were appointed by the King.

While there is mention of the trial by jury at the very inception of the colony, and trial by jury was guaranteed in the ancient char-

¹ Note in Hening's Statutes, Vol. 1, p. 121.

ters as to criminal offences, which were to be tried by "twelve honest and indifferent persons, to be sworn upon the Evangelists," etc., there are no court records of any jury trial until 1630, and it appears from them the number of jurors was not confined to twelve.

On the records of the "Governor and Council, there appears the following: "July the 9th, 1630. Dr. John Pott, late Governor arraigned and found guilty of stealing cattle, 13 jurors, 3 whereof councillors. This day spent in pleading; the next in unnecessary disputation: Pott endeavoring to prove Mr. Kingsmeal (one of the witnesses against him) a hypocrite, by a story of 'Gusman of Alfrach the Rogue.'" And on "July 30, 1630, William Matthews, servant to Henry Booth, indicted and found guilty of *petit treason*, by fourteen jurors. Judgment to be drawn and hanged.'

Prior to the monthly courts, the authority and jurisdiction committed to them had been exercised by what were called "Commanders of Plantations." They were officers in whom were vested both the civil and military command of a settlement. Each settlement was separately organized under its own Commander, whose large discretionary powers insured to the settlers the best internal order, as well as the greatest security against incursions of the Indians who constantly menaced them.

After population had materially increased, these Commanders of Plantations became Commissioners of the Monthly Courts, and later Justices of the Peace, who, when counties were laid off and the Monthly Courts were changed to County Courts, constituted the County Court Bench. This latter change occurred in March, 1642, when the County Courts were first instituted, and their sittings thenceforward were to be once in two months. This ancient court continued for over two centuries, and occupied a place peculiarly its own among the judicial institutions of Virginia. It was also the police and

fiscal agency of the county; it made the tax levy for county and state, appointed road supervisors and overseers of the poor, regulated tolls on roads, bridges and ferries, etc. Thus the citizen was in constant touch with the County Court, and in time its standing became elevated to a high degree. It was no small honor to sit upon that bench, requiring, as it did, the best ability and talent of the colony. So it was generally composed of landed gentlemen of liberal education, many of them graduates in law.

"So perfect was the organization of the County Courts," says Henning, "so extensive the jurisdiction of the magistrates, both in law and equity, and so important their functions in police and economy, that at the period of the Revolution our ancestors did not venture to touch the law establishing the County Courts, while the organization of the Superior Courts was materially changed."

Such confidence was there in the intelligence and probity of the justices that it is seldom a jury was ever demanded, so that they sat as judges, both of the law and of the fact, and it is said there were fewer appeals from their judgments than from any other tribunal of the State.

This ancient and honorable court, under the various mutations of times and circumstances, has undergone such radical and organic changes that its name is about all that is now left as a relic of its former dignity and fame.

The "Governor and Council," after establishing the County Courts, became itself the first Court of Appeals, with however, original jurisdiction in certain matters. It was styled the Quarterly Court. The time and place of its sitting was provided by an act of the House of Burgesses, February, 1613, in the following resolution:

It is ordered and appoynted that the fowre quarter courts shall be held in James City yearlie, as followeth vizt. uppon the first day of September, the first day of December, the first day of March and the first day of June.

¹ Henning's Statute, Vol. 1, p. 146.

A contention of long standing between King James and the chartered company culminated in July, 1624, when the company was ousted of all its rights without retribution. "The seizure by the King of the powers and property of the company does not seem, however, to have materially affected the people of the colony, as the King immediately appointed a committee to discharge the functions of the deceased company, and himself succeeded to the benefit of their monopoly."

The Assembly, as the House of Burgesses was called, had gradually become a representative body, and as such, its enactments militated more and more towards popular enfranchisement, including a resolution "that there should be no taxation without representation," — a fundamental principle of civil liberty. So early as 1645 the colony of Virginia had practically acquired control of its internal affairs and laid the foundations of a popular and representative government. The Governor, however, continued to be appointed by the court, except that during the interregnum under Cromwell's usurpation they were elected by the Burgesses.

Whatever the advancement of England as to government, arts, science and all that goes to make up a civilization, and whatever of these were carried with the adventurers who founded the colony in Virginia, it is plain that in settling a new and distant country, while adhering as closely as possible to the cardinal *principles* of English civilization, *methods* at least had to be altered and made conformable to *totally different conditions*.

The colony had, from the beginning, to provide both for its own subsistence and for defence against the barbarous aborigines, who at once became its enemy. It carried with it the Established Church of England, and religious proscription. It found the indigenous plant, *tobacco*, familiarly known as "The Virginia Weed," and early made it the chief article of barter and export, and thus the principal source of revenue. It was

also the *currency* of the colony, and to large degree *the standard of values*. Salaries, stipends, debts and public dues were made payable in tobacco.

It will be interesting, therefore, to trace the social evolution of the Colony by referring to some of the enactments of its law-making body, as to these and kindred subjects.

It is to the foresight, labor and care of Thomas Jefferson that we owe the preservation of most of the early records of the Assembly, now extant, and it was chiefly from his collection of MSS. and printed laws that Mr. Hening was enabled to publish the first volumes of his "Statutes at Large."

On one of these MSS. is indorsed in the same hand,

"THE FIRST LAWS MADE BY
ASSEMBLY IN VIRGINIA, ANNO
MDCXXIII."

And immediately underneath, in the handwriting of Mr. Jefferson, is this indorsement :

This was found among the manuscript papers of Sir John Randolph, and by the Honorable Peyton Randolph, Esq., his son ; was given to Thomas Jefferson.¹

From this manuscript it appears the first recorded act of the Assembly was that of 1623-4, and related to the church, as follows :

That there shall be in every plantation where the people use to meete for the worship of God, a house or roome sequestered for that purpose, and not to be for any temporal use whatsoever, and a place empaled in, sequestered only to the burial of the dead.

That whosoever shall absent himself from divine service any Sunday without an allowable excuse shall forfeite a pound of tobacco, and he that absenteth himself a month shall forfeite 50 lbs. of tobacco.

ffor the preservation of the puritie of doctrine and vnitie of the Church. It is enacted that all ministers whatsoever, which shall reside in the

¹ Hening, Vol. I. p. 121.

Colony, are to be conformable to the orders and constitutions of the Church of England. . . . And that the Gov. and Counsell do take care that all non-conformists, upon notice of them, shall be compelled to depart the colony with all convenience.

The duties of ministers and church wardens were laid down in specific enactments which extended to their personal deportment as well as official acts. It was enacted :

That ministers shall not give themselves to excess in drinkinge or riott, spendinge their tyme idelie by day or night, playinge dice, cards or any other unlawful game, but at all tymes convenient they shall heare or reade somewhat of the holy scriptures. . . . And endeavour always to profit the Church of God, . . . and should be examples to the people to live Christianlie.

The saying, "laws are made to be broken," found no exception in those regulating the clergy in Virginia, and for more than a century they had the name of a frolicking set, many of them spending more time in gaming, riding to the hounds and drinking than in their ministerial duties, and then were only perfunctory and official in their performance. The instances where they were "examples to the people to live well and Christianlie" were the exception and not the rule.

The pay of the ministers was provided for in tithes of tobacco, and sometimes, also, of "corn, calves, kids and pigs," and these not being always easy to barter to advantage, it is in evidence that they liberally consumed their tobacco in chewing and smoking, and fared sumptuously upon roast pigs.

It was in an effort of the ministers at a later period, to prevent the planters from commuting their stipends into payments of money at their option, in a suit at law called the "Parsons Cause," that Patrick Henry first developed his marvelous eloquence. Being counsel for the County Collector in that case, in opposing and denouncing the exactions of the "parsons" who were regarded

as belonging to a privileged class, he struck a popular chord and was wafted on to fame.

Laws for regulating the intercourse of the people with the Indians, and for protection against their incursions occupy an important place in the early legislation.

The following was enacted as a precaution against Indian treachery.

It is ordered, That no person or persons shall dare to speake or parlie with any Indians, either in the woods or in any plantation, yff he can possibly avoid it by any meanse. . . .

And not to suffer them, especially the Mattawombes, to make any ordinarie resort or abode in their houses.

That men go not to worke in the ground without their arms (and a centinell upon them).

That every dwellinge house be pallsided in defence against the Indians,

That no man go or send abroad without a sufficient party well armed.

That there be *dew* watch kept by night.

As more friendly relations obtained, there was much legislation regulating trade with the Indians, and defining their landed rights, etc.

Tobacco, being the principal crop, as well as the standard of value in barter, or the currency of the colony, much legislation was required to regulate the volume as well as the quality of it. This was done by restricting the quantity allowed to be raised, and by regulating the processes of its culture, gathering and marketing. Where this failed the price of it was fixed in standard English money.

The planting of tobacco was a privilege, it being enacted :

That all gunsmiths and nailors, brickmakers, carpenters, joiners, sawyers and turners be compelled to worke at their trades and not suffered to plant tobacco or corne, or doe any other worke in the ground.

That noe person whatsoever shall plant or tende above two thousand plants of tobaccoe for every head within his family including wemen and children.

That if any man hereafter who shall make

any ill or bad conditioned tobaccoe, and shall offer to pay away the same to any person or persons, either for debts, merchandise or any other commodities, it shall be lawful for the commander of every plantation, with two or three discrete men of the said plantation, to burne the same. And the partie . . . shall be hereby barred from planting any tobacco until he bee reedeemed by a General Assembly.

Second crop tobacco was not allowed to be marketed, nor the stocks, stems, nor top and bottom leaves of any allowed to be gathered, the penalty being "that the servants be punished by whippinge and to bind over the master to the next quarter Court at James Citty."

The use of tobacco had rapidly spread from the new to the old world and become general in all parts reached by commerce. Sir Walter Raleigh and the first adventurers acquired the use of it, and upon returning to England introduced it even into the court circle. It is told of the illustrious Raleigh, that "he tooke a pipe of tobaccoe a little before he went to the scaffold." Supposing it to have been the best quality of Virginia leaf, he could hardly have spent his last moments in a more sensible and comfortable way, that is, from a material point of view.

The whole process of planting, gathering, curing and exchanging tobacco was regulated by laws that required a host of officials to supervise and enforce the execution of them. A great part of the legislation for a century and a half was devoted to this subject, such an important place did tobacco occupy in the economy of the colony.

In general, however, the laws were few and simple, and existed in manuscript without codification. They were made public at the end of the sittings of the Assembly by word of mouth, being read aloud by the clerk, and sometimes copies posted in his office. The representatives, also, returning home, acquainted their constituents with such as most concerned them.

Under such primitive methods it is diffi-

cult to imagine a more unpromising field for lawyers, and it is impossible to suppose there could have existed during the first hundred years of the colony any number and organization of the legal fraternity worthy to be dignified as "The Bar." Yet, that the craft did occupy the field, at least as early as 1642, is evident from the records, and they seem to have given the Assembly almost as much trouble as the Indians.

In March, 1642, "It was enacted for the better regulating of Attorneys and the great fees exacted by them," that it should be unlawful for them to charge "for petition, declaration or answer and pleading, in the County Court not more than 20 lbs. of tobacco or its equivalent, and not more than 50 lbs. or its equivalent in the Quarter Court." The penalty for overcharging being a forfeit of 500 lbs. of tobacco in the County Court, and 1000 lbs. in the Quarter Court.

They were licensed by the court in which they pleaded and could not have license for more courts than the Quarter Court and *one* County Court. And "it was further thought fitt, that no Attorney licensed as aforesaid shall refuse to be entertayned in any cause, provided he be not entertayned by the adverse party, upon forfeiture of 250 lbs. of tobaccoe in a County Court and 1000 lbs. of tobaccoe in the Quarter Court, one moyety whereof shall come to the King's Majesty, and the other halfe to the informer."

The foregoing act and penalty did not apply to "such as shall be made special attorneys, nor to such as shall have letters of procuration out of England."

It must have been the habitual practice of the Attorneys to evade the law limiting their fees notwithstanding the heavy forfeitures, as the Assembly continued to legislate against them, and a battle was on, in which the resourcefulness of the attorneys was arrayed against that lawmaking body, in a struggle for their professional existence.

At the session, November, 1645, the Assembly resolved,

Whereas, Many troublesome suits are multiplied by the unskillfulness and covetousness of Attorneys, who have more intended their own profit and their inordinate lucre than the good and benefit of their clients,

Be it therefore enacted, That all Mercenary attorneys be wholly expelled from such office, except such suits as they have already undertaken, and are now depending, and in case any person or persons shall offend contrary to this act to be fined at the discretion of the Court."

In March, 1646, the act of 1642, providing for the license and fees for Attorneys was repealed, and the act quoted above was reenacted.

It does not seem, however, that the lawyers abandoned the colony, as in that case further legislation would not have been necessary. On the contrary an act calculated to annihilate them passed the Assembly at the next session in 1647. It provided that they should not "take any recompence either directly or *indirectly*;" from which it would appear there still existed some occult and intangible methods by which the wary Attorney managed to render a service and pocket his fees.

But it was intended that the whole profession should be laid out and prepared for burial, by the further provision: "That it be further enacted, that if the courts shall perceive that in any case either plt. or defendant by his weakness shall be likely to loose his cause, that they themselves may either open the cause or appoint *some fitt man out of the people*, to plead the cause, and allow him satisfaction requisite, *and not allow any other attorneys in private causes betwixt man and man in the country*."

How the war between them fared during ten years following, history is silent. It is safe however to assume, from the traditional ability of the legal craft to live, move and have their professional being, which in their case, is synonymous with the charging and collecting of fees; that during that unrecorded decade, they camped somewhere on

the field, *and did something more than merely exist*.

Indeed, Professor Minor asserts, referring to this period, that, "lawyers lived and flourished, the necessities of society proving more than a match for the stolidity of the Grand Assembly, so that that body, abandoning at length the vain design of suppressing the profession, betook itself to the not the less futile attempt of regulating their charges." ¹

The warrant for this assertion is found in the following act of the Assembly in December, 1657. "This Assembly finding many inconveniences in the act prohibiting mercenary attornies, *doe therefore hereby enact*, and be it by these presents enacted, that that act, and all other acts against mercenary attorneys be *totally repealed*. . . . And if any controversies arise between attorney and client about their ffee, it shall be determined in the court where the cause is pleaded."

While laws prohibitory and restrictive, applying to attorneys, continued to be enacted at intervals during the next hundred years, yet, being in the nature of of things impracticable, they became dead letters and eventually disappeared from the statute books. The people in their multifarious public and private transactions being amenable to law, the assistance of a professional class whose specialty it was to know the laws and to be able to advise and speak for a clientage was a necessity, hence the existence of lawyers, and the impossibility of suppressing them. But, who were the lawyers of that period? For fully a century they seem "to fortune and to fame unknown," not one of them having attained to a notoriety or distinction worthy of a biographer. They could not have been barristers, nor counsellors at law, as there could not have been a practice, in the infancy of the colony, sufficiently lucrative to attract men who were matriculates of the English bar.

¹ Minor's Institutes Vol. IV., p. 168.

The fact that they were legislated against as a nuisance, under the name of "mercenary attorneys," precludes the idea that they were men of character and influence. They were doubtless, as a class, mere charlatans at law, whose volubility of tongue and assumption of profundity secured for them a clientage among the ignorant, but whose abilities entitled them to class no higher than the genus pettifogger, the like of whom, though rare, still exists in some way back precincts.

It is intended, of course, to except the Attorney Generals, who were officers of the Crown and men of distinction, of whom were Sir John Randolph and, in succession, his sons, Peyton and John.

Among the earliest lawyers of distinction was Edward Barradall, who practiced extensively in the County and General Courts. He was a member of the Council and a Judge of the Admiralty Court. It was under his rigid examination that Edmund Pendleton was admitted to the bar. He married a daughter of William Fitzhugh, who was also an eminent lawyer in the Northern Neck, and member of the Council. He died in 1743.¹ About the same time flourished John Halloway, who had a large practice and was some time Speaker of the House of Burgesses; also Edward Hopkins and others of fair ability.

But the fullness of the time had not yet come when the bar of Virginia was to illumine the world with that galaxy of resplendent men, whose genius it was to prepare a people for self control, to create constitutions for free States, and reorganize government along the lines of popular sovereignty. Talent in men is most often latent until the opportunity arrives to exercise it, but great minds help to make the opportunity. The fires of American independence were smouldering half a century before they burst into the flame of 1776, and it was this latent sense of liberty that developed the men of Vir-

ginia, who appeared upon the stage of her history in the latter years of the colony and prepared it for the coming commonwealth. They were men whose minds had long revolved thoughts, the which to have expressed would have been treason; men who recognized it as an unreasonable condition that half a continent of Anglo Saxons, fully capable of self government, should continue the mere appendage of an insular monarchy, out of sympathy and touch with them, three thousand miles over sea.

The first to give public expression to the thought was Patrick Henry, the most eloquent member of the colonial bar, of whom George Mason said: "While he is the most powerful speaker I ever heard, his eloquence is the least part of his merit. He is in my opinion the first man on the continent, as well in abilities as public virtues, and had he lived in Rome about the time of the First Punic War, when the Roman people had arrived at their meridian glory, and their virtue not tarnished, Mr. Henry's talents must have put him at the head of that Commonwealth." His contemporary, and more distinguished as a profound lawyer, was Edmund Pendleton, whose career, commencing in comparative obscurity, by the force of his innate powers, led to the highest eminence of fame, national as well as colonial.

At this time also, Paul Carrington, John Blair, Richard Bland and Robert Carter Nicholas adorned the bar, men of the highest order as statesmen and patriots, and abounding in private as well as public virtues. Of the latter, says Hugh Blair Griggsby: "He became a leading one of the leading counsel at the bar of the General Court, when that bar was radiant with the genius and eloquence of Peyton Randolph, Wythe, Pendleton, Thompson, Mason, Henry, and John Randolph, the Attorney General."

Almost without an exception these men had been members of the Assembly, judges of courts, members of the Committee of Safety or the Committee of Correspondence,

¹ Meade's Old Churches and Families of Virginia.

and delegates to some or all of the patriotic conventions, serving the commonwealth with distinction in almost every public capacity, at home, and also as delegates to the Conventions and Congress of the United Colonies. Truly the bar of Colonial Virginia was the school of patriots and statesmen, for whom the country at large was its debtor.

From it, the Supreme Court of the United States drew the gifted John Blair, Chief Justice Marshall and Bushrod Washington.

While neither Geo. Mason, who drafted the famous Bill of Rights, Thomas Jefferson, author of the Declaration of independence, nor Richard Henry Lee, who moved the resolution that "these United Colonies are,

and of right ought to be, free and independent States," were ever practitioners at the bar, they were lawyers in the sense of their profound acquaintance with the law, the ancient charters and the English constitution. They were *law makers* and thus closely allied with the Colonial bar.

The eminent services of these great men to the national government, in its formative period, is familiar history. The names we have mentioned are only a few of the jurists and statesmen, as well as soldiers, contributed by the Colony of Virginia, her courts and bar, whose achievements redounded to the greatness and glory of the young and struggling Republic.

ATHENIAN LAWSUITS.

By A. H. NELSON.

WE are told that the Athenians of the first century of the Christian era "spent their time in nothing else but to tell or to hear some new thing." That eager search after novelty seems to have been a marked characteristic of the dwellers in "the city of the violet crown," for of their ancestors in the fourth and fifth centuries B. C. an eminent writer upon Grecian antiquities has said, "The time of the Athenians was about equally divided between the litigation and theatre going."

New things must have been daily seen and heard in the conduct of lawsuits in Athens in the days of Aristotle, and with all of our boasted improvement in legal procedure we seem, in many instances, to have only copied methods that were in use even during the tyranny of the Thirty and the Ten, if not in the even more remote past of Solon and Dracon.

Athens passed through eleven quite distinctly marked political revolutions. In the last of these democracy, thrice overthrown,

was again restored, and since it was through the political sagacity as much as by the military prowess of Thrasyboulus that first the Thirty Tyrants and, subsequently, their direct, but only temporary successors, the Ten, were deposed, that politico-military leader became the head of the latest Athenian democracy.

In the third century, B. C., when the Athenians were living under this Democratic Constitution, there were in every lawsuit four formally prescribed steps that must be taken to secure the verdict of the HELIAIA or Supreme Court.

I. THE SUMMONS OR PROKLESIS. This must in both civil and criminal cases be served by the plaintiff or prosecutor, in person and in the presence of witnesses. A most notable instance of such service of summons we have in the case of Alcibiades, who, having been impeached before the Senate, was overtaken while on his way to Sicily and ordered to return and stand trial. The presence of two witnesses was required

for legal service of summons, and a judgment by default could be set aside if proof of the presence of such witnesses could not be furnished. The defendant or accused, was to appear before a certain magistrate upon a day fixed, but by law, certain classes of cases could be heard only on certain days or during certain seasons of the year. For example, a suit on account of debt could be heard only on the last day of the month; only in the months between October and March could suits growing out of mercantile transactions be heard; no claims by reason of inheritance—Probate Court business—could be fixed for hearing on any day in June, than the last month of the year. An indictment for murder could not be found in any one of the last three months of the year, for in all such causes, three preliminary hearings must be had, with an interval of a month between. In one class of criminal cases called *EPHEGESIS*, where a suspected criminal was discovered in hiding, the prosecutor had to take the magistrate to the place where the suspect was concealed, instead of taking the latter before the magistrate.

2. *THE EX-PARTE HEARING OR LEXIS.* In civil actions this was generally before one of the forty demic or tribal judges. The magistrate who conducted this examination introduced the case, when finally ready for trial, to the *HELIAIA*, and was present during the trial. In public or criminal cases the *THESMOTHEAI*—six in all—had general jurisdiction. Special classes of cases were, however, by law assigned to special judges. All cases relating to marriage, divorce, testate or intestate estates, must be brought before the *ARCHON*; and all actions in which an alien resident of Athens was plaintiff must come before the *POLEMARCH*. At this hearing the plaintiff submitted his case in writing and the magistrate could reject it, throw it out of Court, for any one of several specified reasons. In this action the magistrate took the place of the lawyer who, in our practice, files a demurrer to the plain-

tiff's bill of complaint. He could throw the case out for want of jurisdiction, because no cause of action was shown; because, being a mercantile case, it was brought in the wrong month, or because the plaintiff was a woman or a minor, and therefore not competent to sue in her or his own name. Just here, however, was introduced a very singular but effective safeguard against judicial oppression. By the laws of Athens every magistrate must, at the expiration of his term of office, render an account of his administration to a tribunal composed of ten accountants and ten judges. This tribunal sat in turn before the statue of the hero from whom each tribe took its name, and when a magistrate rendered his final account to the *HELIAIA* any one who thought that his case had been unjustly thrown out of Court by such judge, could, within three days after the filing of such account, deliver to the member of the tribunal representing the tribe to which such complainant belonged, a tablet on which, over his own signature, was written the offense charged, the name of the accused magistrate and the penalty demanded. If such judge found the charge well founded he passed the tablet on to the *THESMOTHEAI*, and by them the accounts of the offending official were again presented to the *HELIAIA* for their examination and final decision. With such an ordeal in prospect—and prejudiced officials often suffered severely for their unjust decisions—magistrates would be very cautious about throwing any case out of Court. The plaintiff's statement being accepted as valid, and demanding redress under the law, the magistrate fixed a day for the appearance of both parties to receive final instruction before going to trial. Payment of office fees must also be made at this time, and if they were not paid before the day for such second appearance, the cause was stricken from the list. If all, however, had been regular up to this time, the cause of action and names of parties were inscribed upon a tablet and suspended

in a public place near the office of the magistrate.

3. THE PRELIMINARY HEARING OR ANAKRISIS. At this hearing the defendant had his first opportunity to be heard. He must either show why the case ought not to be sent up for trial, or what defense he had to offer. Here he could plead the doctrine of "res judicata," or "the statute of limitations," as well as the same grounds upon which in the first but *ex parte* hearing, the LEXIS, the magistrate could throw the suit out of court. In the statute of limitations, there were some very peculiar features. For instance, it did not run against the offense of uprooting an olive tree. Suit could be brought for that cause at any time, while a prosecution for violating the Constitution must be begun within one year after the offense was committed. If in a criminal case, the prosecutor failed to appear at this hearing, he was fined 1000 drachmas, and could not again appear as the prosecutor in any case. According to Aristotle, the evidence to be presented at this hearing was of five classes: 1, copies of laws; 2, written documents, contracts, wills, etc.; 3, witnesses; 4, oaths; 5, tortures.

Only males, not parties to the suit, who were over eighteen years of age and were freemen of good reputation could testify. A witness who failed to appear was liable to a suit for damages. In criminal cases and after a second summons by the crier, a defaulting witness was liable to a fine of 1000 drachmas. Each party had to lead up to the altar to take the oath, the witnesses for the other party. By the classification of "Oaths," as a kind of evidence distinct from "Witnesses," is meant the testimony of parties to the suit and sometimes of women. With consent of the opposite party, or on his demand, the plaintiff or defendant could be sworn. If a party thus challenged refused to swear, such refusal was considered as an admission of the fact to be sworn to. If, however, the party accepted the challenge

or testified with consent of his adversary, he could not afterward be prosecuted for perjury. When, however, the cause was on trial such testimony was not to be taken as conclusive. The party allowing or calling for such testimony was allowed to prescribe the formula of the oath, the most solemn form being by the heads of the deponent's children. Apparatus for torture and men to operate it were to be seen in even the most trivial lawsuits in Athens. It was very often provided for the occasion by the plaintiff or prosecutor himself. While the law did not allow slaves to testify, testimony elicited from them while under torture, was considered more reliable than the oath of a citizen. As the proportion of slaves to full grown freemen in Athens was about 12 to 1, the public sentiment that controlled in the testimony of slaves in lawsuits was that of the minority, and that is always merciless. At these preliminary hearings the work of torturing innocent persons in order to get reliable evidence went on for at least 250 days in every year. At these hearings the fees were paid for by both parties, the winner to reimburse the loser. If the value at issue was less than 100 drachmas no fees were paid. In convictions for digging up olive trees the defendant paid 100 drachmas per tree to the State and 100 to the prosecutor. The ANAKRISIS concluded, the evidence that had been secured was placed in two caskets that were then securely sealed, and were not to be opened until the day of trial. Civil suits could be compromised or dropped entirely at any time before trial. A prosecution in a criminal cause could be withdrawn by consent of the magistrate.

4. THE TRIAL OF EISAGOGÉ. Every trial must be concluded the same day that it was begun. The days of trial and the cause fixed for each day were shown upon tablets hung up in places of public resort. When the day of trial arrived, the crier, by direction of the presiding judge, called the parties into court, and the clerk then read the com-

plaint and answer. Each party had to conduct his own case. If he was doubtful of his forensic ability he employed a professional speech writer to prepare a speech for him, which he committed to memory and recited before the HELIAIA as best he could. To pay or to receive money for services as an advocate was illegal, and therefore such assistance when rendered, was ostensibly gratuitous, but there seems to have been no effectual method of detecting violations of that law. After the record of both sides, as found in the caskets, had been presented by the magistrate who presided at the *ex parte* hearing, and the speeches of both parties and their advocates, if they had them, had been delivered, the presiding judge directed the jurors, those members of the HELIAIA who had been drawn for the case, to cast their ballots at once and without consultation. This method of rendering a verdict is the most unique feature in the conduct of Athenian lawsuits, and would most effectually put an end to jury bribing could it be used in our practice. The number of judges who constituted the HELIAIA or Supreme Court, or more properly, considering its functions rather than its constitution, the Supreme

Jury of Athens for the final decision of all civil suits, was not always the same. The entire membership, out of which a certain number, never less than fifty, were chosen by lot, and at the time of each trial, was 6000. The number usually drawn for the trial of each cause was 200. A writer upon Grecian jurisprudence thus describes this balloting of the jury:

"In the fourth century before the Christian era they generally used disks of bronze inscribed with one of the letters from A to K showing the jury section to which they belonged, and having a projecting transverse axis either pierced or solid, the pierced for condemnation and the solid for acquittal. Every juror received one of both kinds, and going up to a tribunal deposited them in two caskets, both provided with a slot in the lid big enough to admit a disk, a casket of bronze for the valid disk, and one of wood for the invalid. If the juror held his disk by the extremities of the axis no spectator could see whether his valid disk was given for the plaintiff or the defendant. When all had voted the valid disks were counted, and the party won his cause who obtained the greater number."



CHAPTERS FROM THE BIBLICAL LAW.

V.

THE JUDGMENT OF SOLOMON.

BY DAVID WERNER AMRAM.

THE wisdom of King Solomon is the theme of writers of the three great religions which sprung from Judæa. In legend and story he has been extolled as the wisest of men, whose insight into the mysteries of life transcended that of all other men, and whose great practical sagacity made him the wonder of the world. Of the many stories concerning his wisdom there is one recorded in the Bible, which may or may not have had a foundation in some actual occurrence, but which in its recorded form must certainly be classed with the legends. It presents Solomon in the exercise of his judicial function, as an Oriental potentate dispensing justice to all comers in his great Hall of Justice. The narration can hardly be said to contain a chapter of Biblical law; it is but the record of the decision of an Eastern judge, whose judgment was rendered after the peculiar manner of those primitive tribunals, which have not as yet established a system of law but which depend upon the inspiration of the moment to reach some sort of just decision. Under the law as we have it codified in the Pentateuch, such a proceeding would have been impossible, but to the irresponsible king all things are possible, his will is the law, and his sense of justice is his people's jurisprudence. In the Biblical story of Solomon's judgment the legendary elements are intertwined with many interesting suggestions of the procedure in such royal oriental courts of law, and it is curious to note that many of the points of procedure that may be found stated either expressly or by inference in the account of the judgment of Solomon, find confirmation in the opinions of the Talmudists.

The king was seated on the judgment seat in his great hall, when two women that were harlots entered and stood before him. The Jewish law always prescribed this relative position of the parties, the judge seated and the litigants standing. And the one woman said, "Oh, my lord, I and this woman dwell in one house and I gave birth to a child with her in the house, and on the third day that I was delivered this woman was delivered also, and we were together, no stranger was with us in the house, save we two alone. And the child of this woman died in the night for she overlaid it, and she arose at midnight and took my child from me and she laid it in her bosom, and her child, the dead one, she laid in my bosom. And when I arose in the morning to give suck to my child behold he was dead, but when I had considered it in the morning, behold, it was not my son which I did bear."

Then said the other woman, "Nay, for my son is the living one and thy son is the dead." And this one said, "Nay, for thy son is the dead one and my son is the living." Thus they spoke before the king.

Upon this state of facts the king was asked to render judgment—a worthy test of his wisdom. Here was the statement of one against the statement of the other, no witnesses being produced by either side, no husband, friend or relative to add to the weight of the testimony of either of the parties. The legend states the facts in such a manner as to preclude any judgment based upon ordinary methods of investigation, and requiring the exercise of extraordinary sagacity to discover the truth. It may be that by cross-examination Solomon might have con-

founded the liar and brought out the truth, and it must be presumed that he was a cross-examiner *par excellence*. But this method would not have satisfied the exigencies of the legend. What would have delighted a lawyer would have tired a layman, and legends do not spring up among lawyers. The popular imagination does not follow the intricacies of close reasoning, nor has it the patience to unravel painfully the thread of a fine-spun argument. It delights in swift and sudden changes of situation, and in a sensational cutting of the Gordian knot. In the popular mind the great judge is he whose methods are direct, swift and striking.

It will furthermore occur to the lawyer that a medical examination of the women might perhaps have determined which of them was the mother of the older child; and indeed Josephus seems to have received a version of the legend in which this objection had been met, for he reports that the two women bore their children at the same hour of the same day.

The king, having heard the statements of the women, fell a-thinking about the case and repeated their words, "This one says, my son is the living and thy son the dead, and that one says, thy son is the dead and mine the living." Some Bible commentators find the clue to the judgment in the manner in which the women made these statements. The false woman, whose object was to retain possession of the living child, shows it in her eagerness to claim him, saying "mine is the living and thine the dead." It is the living child, the one she has in her possession, that she emphatically names first, whereas the true mother, who has had the dead child thrust upon her, says, "Nay, thine is the dead child and mine is the living." She desires to be rid of the dead child and regain possession of her own child. The value of this suggestion is left to psychologists; it could hardly have been the means of giving light in so difficult a case. But whether this was the clue or not, the king, after having

repeated these words of the women, suddenly cried out, "Fetch me a sword." His repetition of the pleas before proceeding to judgment is approved by the Talmudists, who made it a rule that the judge before rendering judgment, must state the case of both sides publicly, very much in the manner in which a judge sums up to the jury in our days. On the other hand, his abrupt call for a sword is severely condemned by some Talmudists as an act unworthy of a judge, who sought by illegal means to frighten the parties and who, had his sentence of judgment been carried out, might have caused the death of an innocent child. It must be remembered that the Talmudists lived under a system of jurisprudence highly developed for many centuries, which compelled judges to follow an orderly and well regulated system of procedure. They could not countenance the capricious and lawless methods of an irresponsible judge, even though he were the king, by which justice was sought by rough and ready means.

Hence Rabbi Judah, a great master of the law, a prince in Israel, and the compiler of the great Code known as the Mishnah, said, "If I had been present when he said 'Fetch me a sword,' I would have put a rope around his neck; for if God had not been merciful and prompted the mother to give up her child rather than see it die, it would surely have been killed by him. Of such a king it is said by Solomon himself, 'Woe unto thee, oh land, when thy king is a child.' (Eccles. 10: 16.)"

Evidently the ancient methods of procedure found little favor in the eyes of Rabbi Judah. In fact the Talmudists were rather impatient of the primitive methods of the Biblical law, even of the law of Moses, and they sought, under the influence of more refined theories concerning human rights and methods of securing them, to modify the severity of the ancient Mosaic law, even going so far as to abrogate it entirely when it was found to be out of harmony with the condi-

tions and requirements of a later stage of civilization.

When the king cried out "Fetch me a sword," he was probably eyeing the two women and noting the effect of his order. At this point, one might suppose that the false woman would have shown signs of terror and could easily by a question or two have been made to confess her fault. But no, the legend is not satisfied with such proof of Solomon's wisdom; as yet there is no climax to the wrought-up feeling of the popular mind. And now comes the climax in all its magnificence. Imagine the Eastern professional story teller telling this tale and gradually working up to the words, "Cut the living child in two and give one half to the one, and one half to the other." The death of the child is to be the touchstone by which to discover the mother. Josephus, in his account of this scene, makes the king order both the living and the dead child to be divided so that absolute equity shall be observed in the division. However pleasing this sensational climax may be to the popular mind, the criticism of Rabbi Judah is to be applauded as being both humane and just. I am afraid that the story would have had a sad ending if the mother had fainted when the sword was produced, and the sentence had been carried out. However, the story teller will not leave us in the lurch. It is his purpose to show that Solomon was wise, and we may safely trust him to get us over the difficult places. The king's threat had the desired effect for the mother of the living child cried out, "Oh my lord, give her the living child and do not kill it," but the other woman said, "Let it be neither mine nor thine; divide it." Now what in the world possessed the woman to make such a statement? What reason was there for her demand that the child should be killed? How lame and impotent a conclusion to her case, which up to this time she had conducted with so much pertinacity, boldness and skill. She had stolen the living child from its mother, pre-

sumably because she wanted it; she had resisted the mother's demands for it, presumably because she wanted to keep it; she had even compelled the mother to go before the king himself to get her child, and there in the royal presence she had thus far under great stress maintained her right of possession, and now at the very moment of her triumph, when the mother publicly relinquished her rights and acquiesced in her possession, she not only declines to take it, but insists upon its destruction. What can be the reason for such unreasonableness? Suppose that after the mother had said, "Give her the living child but do not kill it," the false woman had said nothing. Solomon would have been compelled to give the child to the wrong woman and a good story would have been spoiled, because there would have been no way of determining whether the true mother or the false claimant was the one who said, "Give her the living child but do not kill it." This might as well have been said by the mother who was in terror lest her child be killed, as by the false woman who was seized with remorse at the last moment and prayed that the child might not be killed. Now we see the reason for the remarkable statement of the false woman. The legend had to add these words in order to make it clear to the popular mind that the woman who wanted to save the child was indeed the true mother, by contrasting with her words those of the false woman who was thus made base even to fiendishness. And thus the famous words of Solomon, "Fetch me a sword," are justified and virtue is triumphant, for the king said, "Give her the living child, and do not kill it; she is its mother."

The story of the judgment of Solomon is not the record of an actual occurrence, but a legend such as the people love to tell about their great men. Here the king sits in all the pomp and glory of royalty, exercising the most important office, that of the judge, and doing justice, not according to the methods of the tiresome lawyers, who talk and reason

and quibble and whom the popular mind has at all times condemned, but in the manner of the noble prince, with royal dignity, with worldly wisdom and with swift hand. That

has always been the popular ideal of the great man, and the men who actually or supposedly conform most nearly to this ideal have ever been the popular idols.

HORTENSIVS.

OF the more immediate contemporaries of Cicero, no advocate approached him in reputation so nearly as Hortensius. He kept himself aloof from the strife of parties, and preferred the luxurious enjoyments of private life to dangerous eminence as a politician. After acting for a short period as military tribune, he gave up the camp for the courts, and was content with the triumphs of the forum, confining himself exclusively to the proper duties of an advocate, in the discharge of which he was inferior only to his great rival. And he spared no pains to attain excellence as a speaker. Cicero says that he knew no one who was animated with greater zeal for his profession; and that, like a statue of Phidias, his genius, when he was still very young, was at once recognized and admired. His memory was prodigious; so that without taking a single note, he could recollect everything that was said by an opponent; and he had no necessity to write down even the heads of any speech which he intended to deliver. On one occasion he repeated off-hand, for a wager, the names of all the articles which had been sold at an auction, the names of the purchasers, and also the prices. He must have found this an immense advantage when practising in the courts. He was distinguished for the skilful manner in which he divided the subjects on which he had to speak, and he was quick and ready in resources. His voice also was clear and melodious, one of nature's best gifts to an orator; but his action was studied, and had too much of artificial effect. He seems to have taken great pains with his personal ap-

pearance, and to have dressed with all the care of a Roman exquisite, adjusting the folds of his robe in the most graceful manner.

In this respect he was not unlike Lord Chatham, who, when a martyr to the gout, used to arrange his flannels with studious care before he rose to speak in the House of Lords; and Erskine was remarkable for the attention which he paid to such matters. We are told that the habit of the latter was to survey beforehand the court in which he was to speak, in order to select the most appropriate place for himself, and that a particularly neat wig (if there be such a thing), and smart yellow gloves, denoted to the spectators the presence of the matchless advocate. Hortensius took such pains with his action and delivery that Æsop and Roscius used to attend the courts where he spoke, in order that they might gather useful hints for the stage, and this once provoked Forquatus, his opponent in a cause, to call him Dionysia, a celebrated dancer, the Taglioni of her day at Rome, upon which Hortensius retorted, "Well! I had rather be Dionysia, than a clumsy, clownish bumpkin like you, Forquatus." While speaking of his foibles, we may mention that he had an extraordinary passion for fish, not as articles of food for the table, but as playthings in his ponds. He had the water sometimes warmed lest they should suffer from cold, and it was said that he once shed tears on the death of a favorite lamprey. Amongst other pieces of extravagance, he used to *water* his plam-trees with *wine*. But we need not dwell longer upon these harmless follies. A graver charge made against

him is that of being privy to the bribery of judges in the courts where he practised. This, if true, is another of the many proofs of the low standard of Roman morals, but it wants authority to support it.

At nineteen years of age he pleaded his first cause, when he spoke in behalf of the province of Africa, and in the name of the inhabitants besought the senate to order the trial of a Roman governor, whom they accused of malversation and corruption. A few years afterwards he appeared as counsel for a royal client, Nicomedes, King of Bithynia, who, being expelled by his brother from the throne, implored the assistance of the Roman Arms, and Hortensius successfully advocated his prayer in the senate. One of his most celebrated efforts was his defense of Dolabella, Cn. F. who was accused by Julius Cæsar of extortion and corruption. He acted as junior on this occasion to Cotta, but so far eclipsed him, that he appeared to be really the leader at the trial. The fault of Cotta was want of fire and energy. He was too languid for the sharp conflict of the bar. "For the crowd and bustle of the forum require a speaker, energetic, spirited, alert, and powerful in voice." Their efforts were successful, and Dolabella was acquitted.

In the great case against Verres, which of all the trials of antiquity bears the nearest resemblance to the impeachment of Warren Hastings, Cicero appeared for the prosecution and Hortensius for the defense. His speech, now unhappily lost, existed in the time of Quintilian, from whom we learn that it would not bear comparison with that of his opponent; but at the outset of the case Cicero paid the highest compliment to his eloquence and skill. A preliminary question had arisen as to who ought to conduct the prosecution, and Q. Cæcilius had the temerity to claim that right, as having been quæstor of the province of Sicily more recently than Cicero, and therefore entitled to appear for the inhabitants in preference to him. But Cicero effectually disposed of his

pretensions in a speech which, for cutting sarcasm and irony, has never been surpassed. It suited his purpose to exaggerate the merits of Hortensius in order to contrast them more strongly with the defects of Cæcilius. And what more ludicrous effect of the disparity between them can be imagined than a confused and erroneous suspicion produced in the mind of the prosecuting counsel by the speech of his opponent, that the client whom that opponent defends is innocent? Yet, this is what Cicero suggests. Addressing Cæcilius he says: "*Ipse perfecto metuere incipies ne innocenti periculum facesseris.*" Of the very few good jokes ever perpetrated by Cicero—and his frequent attempts deserved a better fate—one of the best was made at the expense of Hortensius, at this trial. The latter was known (in violation of the Cincian law, which required the services of advocates at Rome to be gratuitous) to have received as a present from his client a valuable image of the Sphinx, one of the spoils of his Sicilian government. While Cicero was examining a witness, Hortensius said: "You speak riddles. I cannot understand you." "Well," rejoined Cicero, "that is odd, for you have a sphinx at home to solve them."

In other causes Hortensius was more fortunate in having Cicero, as his colleague. They were associated in the defense of C. Rabinius, who was charged with having caused the death of a tribune of the commons, and Licinius Murena and Publius Sylla, who were both at different times accused of bribery and corruption in canvassing for the consulship, had these illustrious orators for their counsel. But the results were different; Murena was acquitted and retained his office, Sylla was convicted and deprived of it. Together, also, they defended L. Flaccus, who was charged with maladministration of the province of Asia Minor, of which he had been for three years governor, and L. Sextus, accused of tumultuary violence in a riot occasioned by the Clo-

dian faction, and Scaurus, impeached on the charge of bribery and extortion, and Milo, when put upon his trial for the murder of Clodius.

Hortensius died at the commencement of the civil war between Cæsar and Pompey, and Cicero, in his dialogue *De Claris Oratoribus*, bestowed a generous tribute of praise upon his friend. "When," he says, "after quitting Cilicia, I had come to Rhodes, and received there the news of the death of Hortensius, it was obvious to all how deeply I was afflicted. . . . My sorrow was increased by the reflection that at a time when so few wise and good citizens were left, we had to mourn the loss of the authority and good sense of so distinguished a man, who had been intimately associated with me through life, and who died at a period when the state most needed him; and I grieved because there was taken away from me, not, as many thought, a rival who stood in the way of my reputation, but a partner and companion in a glorious calling. For if we are told that, in a lighter species of art, noble-minded poets have mourned for the death of poets who were their contemporaries, with what feelings ought I to have borne his loss with whom it was more honourable to contend than to be without a competitor at all; especially as his career was never embarrassed by me, nor mine by him, but, on the contrary, each was assisted by the other, with mutual help, advice, and encouragement. But since he, with that good fortune which he always enjoyed, has departed from us at a time more favorable for himself than his countrymen, and has died when it was easier if he still lived to deplore the condition of

the republic than to render it any service, and since life was spared him so long as it was permitted to dwell with virtue and happiness in the state,—let us bewail, if so it must be, our own misfortune and loss, and consider his death an occasion rather for congratulating him than condoling with ourselves, so that whenever our thoughts turn to the memory of a man so illustrious and blest, we may show that we have more regard for him than for ourselves. For, if we grieve because we can no longer enjoy his society, that is our calamity, which we ought to bear without giving way to excessive sorrow, lest we should seem to regard his death not as the bereavement of a friend, but the loss of some private advantage of our own. But if we mourn as though some evil has happened to himself, we show that we are not sufficiently thankful for his good fortune."

It would be unfair to omit all mention of Hortensia, the daughter of this brilliant orator, for she seems to have inherited the mantle of her father's eloquence; and we are told by Valerius Maximus that when the triumvirs, Octavius, Lepidus and Antony, had imposed a tax upon the Roman matrons, and the advocates of the day were craven enough to decline the perilous task of speaking on their behalf against the obnoxious law, Hortensia came forward as the champion of her sex, and made such an effective speech that the greatest part of the tax was remitted. Quintilian says of this accomplished lady, that her speech was well worthy of perusal, without taking into account the sex of the speaker.

JUDGES IN THE OLDEN TIME.

LORD Campbell in his "Lives of the Chief Justices" of England brought to light much that is odd and interesting. From this work we propose to glean as many curiosities as will interest the reader for half an hour, if he will favor us, or, as we might put it, favor himself with reading what, for his amusement, we are about to write.

Lord Campbell's lives commence with the Norman Conquest, for the Chief Justiceship was a Norman, and not an Anglo-Saxon institution—indeed, an attempt on the part of the King to centralize the administration of justice in a Supreme Judge, as he aimed at centralizing the administration of government in his own supreme majesty. It did not succeed, however, if it was ever intended, as a destroyer of already existing institutions. In course of time this, with all Norman innovations, cordially compromised the matter with what was more democratic in the use and wont of law or government, and the whole has come down to us as one venerable unity.

From the reign of William, the long series of Chief Justices consisted of nobles and baron bishops, who were usually men of mark under the crown, and whom it was necessary to conciliate with the possession of power. In the reign of Henry III., this dangerous order of Judges fell into disloyalty, and a good excuse was furnished for restricting their duties to matters of mere administration. The line of baronial justices, however, closed, it is considered, with the best on the list, a man of genius and humble origin, who, in the confusion of the time, slipped into office for a year or two. This was Henry de Bracton, whom Lord Campbell calls one of the greatest jurists of any age or country. Curiously enough, the first of the mere Judges, the first Chief Justice, "at the King's pleasure," was not a civilian, as had been determined, but a baron, a

son of the sword, a Bruce—the grandfather of "the Bruce of Bannockburn." He had learned the law in England, and continued there until the accession of Edward I., when on the death of the Maid of Norway, he returned to Scotland, and threw himself into the tumult of the Scottish succession. One Chief Justice was hanged at Tyburn, in 1389, by the barons, who were then at variance with Richard II., and who saw in the Judge their great enemy. Shortly afterward, several of the Judges were tried by the House of Commons, for having given the King false advice at Nottingham, with the view of preventing a convocation of the barons. They were transported to Ireland.

In the biography of Sir William Gascoigne, Lord Campbell contends, in spite of those who would throw historic doubt over the matter, that this Chief Justice did really commit Prince Henry to the Bench Prison, for interfering violently in behalf of one of his servants, indicted at the bar of the court. The successor of Sir William was Sir W. Hankford, of whose life nothing is so memorable as his mode of leaving it. He wished to die, but shrank from suicide, seeing that the self-slayer's goods were usually forfeited and he himself buried in a cross-road, with a stake through his body. Several of his deer having been stolen, he set a keeper to watch in the park at night, with orders to shoot any intruder who would not answer when challenged. One dark night, the keeper met such a man, and shot him dead; that man was his master. The story is well authenticated.

In a succession of Chief Justices, we find no remarkable men till Queen Elizabeth's time; they were mostly subservient to the powers that were, particularly in the time of Henry VIII., who, reigning after the fall of the barons and before the rise of the commons, enjoyed the Golden Age of English

Royalty. His Chief Justice, Montague, when a young man, just sent to the House of Commons, was ambitious of playing a Roman part for his *début*; and denounced, in a florid harangue, Wolsey's coming down to *that* House, to hurry on a very slow money-bill. But next day he was sent for by the King who thus addressed him: "Ho! will they not let my bill pass?" The young patriot, in a great fright, went on his knees, when the jovial Henry, laying his hand on his head, went on: "Get my bill passed by twelve o'clock to-morrow, or else by two o'clock to-morrow this head of yours shall be off!" Montague was immediately cured of his public spirit, and became a steady, courtier the rest of his days.

The most remarkable Chief Justice in Queen Elizabeth's time was Popham. He was stolen by gypsies in his infancy, and his life in early youth was wild, reckless and profligate. While a law student in the Middle Temple, he was in the habit of robbing travellers on Shooter's Hill—at that time rather a gentlemanly employment. His wife, however, reclaimed him, and he became a hard student.

After Popham—who died immensely rich—came Chief Justice Fleming, of whom James I. used to say (and it is sufficient here to say), that he was a Judge after his own heart; and then came "the greatest oracle of English municipal jurisprudence," Sir Edward Coke. His father was a lawyer, and the son (born 1551) resolved to study law too, make money and be a Judge. He was a miracle of perseverance and industry. He seemed to live on his "law" as Boniface lived on his ale: he ate it, and drank it, and slept upon it, allowing himself none of the amusements natural to those of his age. Neither then, nor at any other time, did he ever read a play, see a play acted, or sit in company with an actor; and yet, like Blackstone, he could write verses for his children. The result of this severe industry was, that he eclipsed all his competitors, and, as Lord

Campbell says, "rose in his profession as rapidly as Lord Erskine did two hundred years later." He married an heiress who brought him £30,000, and lived happily with her above a dozen years. He was all his life a mere lawyer. Neither philosophy nor poetry had any place in his hard practical mind. He had a dry pedantry of speech, which it is now amusing to read. Being chosen Speaker in the Commons, he began his first speech to the Queen thus: "As in the heavens a star is but *opacum corpus*, until it hath received light from the sun, so stand I, *corpus opacum*, a mute body, until your highness's bright shining wisdom hath looked on me and allowed me." This he doubtless considered particularly choice and happy.

On the accession of King James, Coke was knighted, and retained as Attorney General. At the trial of Sir Walter Raleigh, his behavior was violent in the extreme, and showed that Judge Jeffreys did not monopolise judicial coarseness and injustice. The only redeeming feature in his insolence was its universality; he flattered no man, high or low. In 1606 he was created Chief Justice of the Common Pleas. In this office he steadily set his face against the despotic attempts of the crown, which, having destroyed the power of the barons, was now destined to yield in turn to the better-rooted power of the Commons. James wished to submit civil as well as ecclesiastical cases to the High Commission. Coke opposed it. The King made him a member of the Commission, but he would not sit. The Archbishop of Canterbury then advised the King to sit in it himself, but Coke told him that by the law of England, the King cannot, in his own person, adjudge any case at all. His majesty got into a rage, to think that he should be under the law! But Coke quoted Bracton against him, and completed his discomfiture with law Latin. The King, on another occasion, required him to stop a trial which he was hearing, and adjourn the court,

but Coke went through with the case and decided it.

In 1621, after an interval of six years, a parliament was summoned, and Coke, who saw that his dream of Court favor was over—seeing too, Lord Bacon high in power—had himself returned to the House of Commons for a Cornish borough, and put himself at the head of those Puritans who were, twenty-eight years later, to overturn the throne. He was then sixty-nine years old. Before the close of the session, he got the Commons to adopt a protestation that the liberties, franchises and privileges of parliament are the ancient and undoubted birth-right of English subjects. James, highly incensed, sent for the journals of the House, tore out the page recording this impertinence, and dissolved the parliament. Coke was committed to the Tower; but on the accession of Charles I., he was again in parliament, and again in opposition. Charles told the Commons, if they did not give the supply, "he must use the means which God had put into his hands," etc. The House fasted and took the sacrament; and the same day, Coke, then seventy-seven years of age, began his quaint and crabbed speeches about Magna Charta, Nullus liber homo, Habeas Corpus, and so forth; and in a short time had drawn up and brought forward the "Petition of Right." It passed the Commons. The King sent lawyers to argue against it at the bar of the Lords, but Coke overpowered them at law, and into law the bill passed. Coke shortly after retired from public life, and published his famous commentary upon Littleton.

Coming now to the time of the Commonwealth, Rolle is memorable for his moderation and his opposition to Cromwell, whenever the policy of the latter led him to disregard the constitution. Oliver was in many things nearly as despotic as the Stuarts. In a case of illegal taxing, he sent for the judges, and rated them for their reluctance to satisfy it. When they spoke of Magna

Charta, he told them that their Magna Charta—giving a very curious and laughable pronunciation, still preserved among the traditions of Westminster Hall—had no weight at all with him in the case. If this same Oliver, whom Carlyle worshiped in his own Teutonic fashion, may be called the hand of the Commonwealth, Chief Justice St. John may be called its head, for he planned all the schemes for the overthrow of the royal prerogative. He was Hampden's counsel in the ship-money case; he was also the author of the English Navigation Laws, repealed only a few years since.

After the Restoration, Sir Matthew Hale was a remarkable example of moral purity and judicial independence at such a period. The witchcraft trial in which he sentenced two poor old women to be hanged, is a blot upon his character; and yet no man should be condemned for his sincere belief. In 1668, he was invited to assist the bishop of Chester and Richard Baxter, in making a church establishment which should include the Presbyterians, but it fell to pieces. Among many other books, he wrote letters to his children; and among other exhortations, advises them "to know the condition of the poultry about the house, for it is no discredit to a woman to be a hen-housewife; to cast about to order their clothes with the most frugality, to mend them when they want," etc. But in his own person he was a great sloven—one of the most simple and careless of mortals. He married his maid-servant in his old age, and never cared to have any intercourse with the great or wealthy; his children turned out none the better for it. Every one to his trade, and every one to his station, say we. Sir Matthew Hale, while administering justice to others, failed to administer justice to his own family.

During the time that elapsed from the Restoration to the Revolution, there were eleven Chief Justices. We single out Scroggs, who first hanged Roman Catholics

for their connection with "the Plot," on the oaths of Oates and Bedloe; then thinking the King's feelings ran the other way, he suddenly turned round on that pair, scoffed at their testimony, and let the objects of his former hatred go uncharged. After Scroggs came Pemberton, who was not sufficiently unscrupulous, and was therefore dismissed to make way for Saunders, who was a corpulent beastly sot—having generally a pint of ale at his elbow on the bench, and very offensive to every one who sat near him. His constant abode was with an old tailor near Temple Bar.

Passing over the "blood-battered" Jeffreys, and the tools of James II., we come to the Revolution. The new order of Judges is worthily headed by Sir John Holt. He was the first to lay down the law, that a slave cannot breathe in England; he also ended the practice of bringing a man's former misdeeds to tell against him on trial, and the practice of bringing prisoners fettered to the bar. He put down prosecutions for witchcraft; in eleven cases he directed the acquittal of the old women; he went further,

and directed that every witch prosecutor should himself be tried as a cheat, whereupon the crime of witchcraft suddenly ceased.

The biography of the bench henceforward loses the interest which belongs to political movement and personal peculiarities. The more constitutional behavior of the rulers, and the quieter course of justice, produce a sameness in which the individual sinks in the office. There is very little attraction in the legal history of the Ryders, Wilmots, Parkers, Pratts, Raymonds and Lees. Lord Campbell closes his list with Lord Mansfield, a man variously estimated in his time, but whose chief merit with posterity is the framing of the Commercial Code of England, which Holt had already been trying to develop. Into the particulars of his life we have no time to enter. We have got over more ground than we expected when we began to cream these volumes. If the reader thinks our gossip too scant, we have put him on the track of finding as much as will suffice him.

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FACETIÆ.

A WITNESS giving evidence in a case tried at the Limerick Assizes used the expression very common in Ireland, "I said to myself," so frequently, that the judge interposed with the remark, "You must not tell us what you said to yourself, unless the prisoner was present. It is not evidence."

COUNSEL (to witness whose answer appears to be somewhat evasive). "Now, sir, remember you have sworn to tell the truth, the whole truth, and nothing but the truth."

WITNESS. "I always aim at telling the truth."

COUNSEL. "Yes, but I fear you are an uncommonly bad shot."

HUMOR, conscious and unconscious, has not quite died out in Irish courts of justice. At the hearing of an action in Cork for the price of a horse, the defendant, who resisted the claim on the ground of breach of warranty, described the animal's condition on the morning after he had bought him, in the following picturesque language: "The horse was like a drunken man. Instead of walking like an ordinary horse he staggered along. The hind legs, instead of having a corresponding action with the fore legs, had a contrary action altogether." In another of the Munster assize courts, an old lady, one of the witnesses, was asked if she saw the prisoner in court. The latter by the way, was being tried for the larceny of certain moneys alleged to belong to the old lady. She took a long and anxious look round the court, and at last said: "I don't see him at present." Then, as her eye lighted doubtfully for a moment on the prisoner,

she added, blandly: "I think—I think he must have had his face washed." Recently, in one of the Dublin police courts, a policeman, in giving a description of the arrest of a prisoner who had offered a stout resistance, said: "He threw himself down on his back, yir honor, an' he kicked out with his hind legs." The constable's imagination was more active than his anatomical accuracy.

JUDGE. "Prisoner, do you desire to say anything in your defence?"

"Well, your honor, it was this way. The governor said it was time to take stock, and I took all I could. Then he went back on me and had me arrested for stealing."

NOTES.

BROUGHAM once contrived to make a holiday pay for itself by the exercise of a little shrewdness. It was in his college days that, by the way of seeing life, he went one autumn to Dumfries in order to be at the Caledonian hunt meeting. According to the then custom everybody dined at a table d'hôte, and after dinner betting set in. Brougham offered to bet the whole company that none of them would write down the manner in which he meant to go to the races next day. Those who accepted his challenge wrote down their conjectures, and Brougham wrote down his intention of travelling in a Sedan chair, a mode of conveyance no one had hit upon. To the races he went, an immense crowd seeing him safely chaired to the course. The bet was then renewed as to the manner of his return to Dumfries, the acceptors taxing their wits to imagine the most improbable method of travelling. Brougham had calculated upon this, and won the double event by returning in a post chaise and pair.

WHEN Judge Martin, of Missouri, was a member of the Supreme Court Commission, there

was assigned to him a case involving an odd point.

Two traders had engaged in a transaction involving the sale of some stock. They had agreed to have the stock weighed on a certain pair of scales. These scales were afterward found to be inaccurate and the trader buying the stock wanted the sale set aside because of this inaccuracy. The lawyer for the other man held that as no fraud was proven or charged, the sale should not be set aside simply because the scales, which both parties had agreed to abide by, were incorrect. The case came before the Supreme Court of Missouri and was referred to the Commission. Judge Martin wrote an opinion in which he held that the sale was not good because of the inaccuracy of the scales, no matter what agreement had been entered into between the parties. He read this opinion to the Court, who indorsed it, and then he said to them:

"But I have not been able to find a single authority in support of my position. The attorneys cited none in their brief and the books that I have examined give none."

Judge Sherwood replied quickly:

"I have an authority exactly in point."

"I wish you would give it to me," replied Judge Martin.

Judge Sherwood went into his room, took from his table where it was constantly kept, his Bible, and brought it to the consultation room.

"Here it is," said he, "the XXIII verse of the XX chapter of Proverbs: 'Divers weights are an abomination unto the Lord; and a false balance is not good.'"

"That is just the thing," returned Judge Martin. "I will put it in my opinion."

And he did.

THE Attorney General for England is paid a salary of £10,000, and the Solicitor General £9,000; but both receive in addition high fees for any cases they may conduct on behalf of the Crown in the law courts. According to a Parliamentary return published in 1895, the highest amount paid in salaries and fees to the Attorney General for England in any year since 1880 was in 1893-4, when the total reached £20,285, this being made up as follows: Salary, £7,000; fees and contentious business, £12,635; clerks, £650. The lowest point reached during the

fifteen years was in 1889-90, when the total was £9,179. The highest remuneration received by the Solicitor General for England since 1880 was in 1888-89, when £6,000 was paid for salary and £5,056 for contentious business; total £11,056, while in 1891-2 it fell to £7,168. The English law-officers have recently been debarred from taking private practice, but as a solatium their salaries were increased by £3,000 or from £7,000 to £10,000, in the case of Attorney General, and from £6,000 to £9,000 in the case of the Solicitor General.

IN the prison in Bangkok, until very recently—at least until the accession of the present King—a large proportion of the incarcerated were held on no personal charge. Many of them were really innocent men detained as substitutes for culpable masters, or even relations. Some women, devoted wives, were suffering there for the transgressions of unworthy husbands. Owing to the reforms introduced by the present sovereign, the rights of all men being recognized and accorded to them, only the personally guilty are now kept behind the bars.

The prison buildings and the accommodations for the detained compare unfavorably with like institutions in India, Burmah and the Straits Settlements. Like them, they are conducted on the principle of making the criminals support the house of their incarceration. Daily, and in every direction, numbers of these prisoners are to be seen at labor in the streets or on other public works. They are always in irons. According to the degree of the crimes they have committed is the amount of extra weight with which they are encumbered. Some of the worst characters, who are constantly detained within the prison walls, are forced to wear about their necks a broad, flat wooden collar, somewhat similar to those worn by vicious cows in Northern Europe. This punishment is very severe, as it prevents the culprit from using his hands to drive away insects that may be attacking his face or head. No statistics being given of the finances of this prison, one can judge only by comparing the workrooms, the salesrooms, and the stock offered for sale in the prison shop at Bangkok with those of the countries named above.

The authorities of this prison have to contend

with the discontent of free mechanics, caused by the competition of convict labor. All power for moving machinery, pumping water, etc., is obtained by keeping a large number of convicts at the tread-wheels. These wheels are horizontal wooden cylinders, from twenty to twenty-five feet in length, supplied with narrow, longitudinal platforms, onto which the prisoners are forced to step and to continue climbing, though they never succeed in mounting, during periods limited according to the judgment of the overseer, who stands by with watch in hand, and who generally gives five minutes' rest after each twelve or fourteen minutes' work.

The shop offers a curious variety of stock. There are pretty and durable plaited colored palm fans; jew-harps twenty inches long, partially of wood; and quantities of baskets of many sizes made of plaited split rattan, almost as durable as iron and really very beautiful. This shop is the principal source of the open-work split rattan balls used in the game of *ragara*, or foot shuttle-ball.

We found the men in charge of these prison wares very phlegmatic. It was difficult to arouse them. They seemed very indifferent as to whether customers bought anything or not, but did not forget to chew the betel-nut. Very little of the revenue of the jail work ever reaches the prisoner.

In the United States, within the recollection of many, the dead bodies of prisoners, unless claimed by friends or relations, were given over to anatomical scientists, whose investigations of the human frame are believed to benefit the human race. In Bangkok, after the death of a prisoner, the authorities assure themselves of that fact by impaling the body. It is then given to the department of cremation, after having been stripped by vultures.

LITERARY NOTES.

THE August ATLANTIC contains several articles that will attract criticism and discussion: President Hadley's practical and much-needed paper on "Political Education;" Talcott Williams's "The Price of Order," how to rule colonies; Mark D. Dunnell's "Our Rights in China," most timely and appropriate in the present crisis; and Sylvester Baxter's "Submarine Signaling," a new and little-known method of saving life on the sea. The number is

peculiarly rich in fiction: Miss Jewett's "The Foreigner;" Alice Brown's "A Sea Change;" Caroline Brown's "Angels and Men;" Fanny Johnson's "The Pathway Round;" Foster's "The Dunganvan Whooper," and Wetherbee's "The Circle of Death," with the conclusion of Howell's brilliant tale, comprise a remarkable gathering of remarkable stories.

THE August Fiction Number of SCRIBNER'S MAGAZINE is always a notable one, both for its short stories and the unusual number of illustrations. This year it will be found especially rich in these particulars as well as in other features. The contents include the names of some of the best-known writers and artists of to-day, and, as usual, those of new contributors to the magazine. Mr. Richard Harding Davis's article, "Pretoria in War Time," gives a vivid and novel idea of the appearance and curious individuality of the Boer capital, and of the way its people viewed the approach of the British, and a most attractive impression of the stalwart figure and vigorous personality of President Kruger. The comments upon the conduct of a number of the captured British officers, in which they are said to have taken their imprisonment in anything but a "sportsmanlike" spirit, has excited considerable discussion. Mr. Ernest Seton-Thompson, author of "Wild Animals I Have Known," etc., contributes "Tito, the Story of the Coyote that Learned How," illustrated with a number of his own inimitable drawings. He describes the eventful puppyhood and education of this wonderful little animal, that by her knowledge of the ways of men saved her kind from annihilation. The other contents are varied and of interest.

THE Midsummer Holiday CENTURY is chiefly notable, perhaps, as introducing a writer hitherto unknown, of whose power to interest those who "never read serial stories" the editors feel confident. The new comer, Miss Bertha Runkle, is a young woman still in her early twenties; and the scene she has chosen for her first effort in fiction is Paris at the time of the accession of Henry IV. The story, which will run for several months, is called "The Helmet of Navarre." It is announced as a dramatic romance of love and adventure, characterized by great inventiveness and by rapid and absorbing action. Among the characters are the King and his opponent, the Duke of Mayenne. In the department of fiction, the number contains also a humorous monologue, "The Author's Reading in Simpkinsville," by Ruth McEnery Stuart, and three other short stories—by Laura E. Richards, Lillie Hamilton French and Mary Knowles Bartlett,—besides an interesting instalment of Dr. Weir Mitchell's

"Dr. North and His Friends." An article that takes the reader far afloat is John Burroughs's first paper on the Harriman expedition to Alaska and Behring Sea. Of this adventurous party were John Muir, of glacier fame, and R. Swain Gifford, the painter, who is one of the illustrators. Another outdoor paper is Maurice Thompson's "In the Woods with the Bow"—a breezy account of hits and misses in shooting at game birds, with humorous pictorial comment by Miss Cory.

WHAT SHALL WE READ?

No recent publication is likely to make so profound an impression upon the reader as Mr. James Lane Allen's *The Reign of Law*.¹ Popular as have been his previous works, the author in the present volume has excelled himself, and the book will take its place among the highest achievements of our American writers. The story records the growth of a strong mind, benighted by early teaching, into the scientific conception of the universe. "Those who still adhere to the old creeds will condemn its teaching, and yet the book is religious in a high degree, and in nothing more than in its tribute to doubt." The work is already in its fourth edition and many more will follow before the extraordinary demand for it is satisfied.

W. Carew Hazlitt has just completed his history of *The Venetian Republic*, its Rise, its Growth and its Fall, which is published in America and England by the Macmillan Company. The time embraced is from 421 to the abrupt ending of the Republic in 1797, and the work is in two octavo volumes. Mr. Hazlitt has traced step by step the metamorphosis of the barren stretch of sand into the political centre which for so long led the civilized world in manufactures, arts and sciences, and which remains perhaps of all cities the most fascinating in its architecture.

NEW BOOKS FOR LAWYERS.

THE LAW IN ITS RELATION TO PHYSICIANS. By ARTHUR N. TAYLOR, LL. B., of the New York Bar. D. Appleton & Co., New York, 1900. Cloth.

The object of this work is to place within the reach of every physician a systematic treatment of those questions of law which present themselves most frequently in his ordinary professional work, and which

¹THE REIGN OF LAW, a tale of the Kentucky Hemp Fields. By James Lane Allen. The Macmillan Co. New York, 1900. Cloth. \$1.50.

he may at any moment be required to know. The author discusses "The right to practice medicine and surgery," "Contract of physician with patient," "Contract of patient with physician," "Rights and liabilities of third parties," "Right to compensation," "Recovery of Compensation," "Civil Malpractice," "Criminal liability," and "Privileged communications." The book is one of value to practicing physicians and to the legal profession as well.

NOTES ON THE UNITED STATES REPORTS, Vol. VII. A brief chronological digest of all points determined in the decisions of the Supreme Court. With notes. Showing the influence, following and present authority of each case, as disclosed by the citations. Comprising all citing cases in that court, the intermediate and inferior Federal Courts, and the Courts of last resort of all the States. By WALTER MALINS ROSE of the San Francisco Bar. Bancroft-Whitney Co., San Francisco, 1900. Law sheep. \$6.50.

This volume covers the cases reported in 8-16 Wallace. We have already expressed our high appreciation of these "Notes," and to those of our readers who are not familiar with this series we can only say that they should become so at once. We know of no work from which the practicing lawyer will derive more valuable assistance.

JEWETT'S MANUAL for election officers and voters in the state of New York. Matthew Bender, Albany, New York, 1900. Law sheep. \$2.00.

This is a complete work on election matters, including all the general laws and constitutional provisions of the State of New York relating to elections, with forms, annotations and instructions. Election officers, candidates, state officials and the courts have long recognized it as the authority on election matters. The following is a brief statement of contents: The General Election Law, Primary Election Law, Penal Code Provision, Constitutional Provision, Town Meeting Law, School Election Law, Metropolitan Election Laws, Soldiers' and Sailors' Election Law, Provisions Relating to Naturalization and Citizenship, Provisions Relating to Elective Officers, their terms of office, qualifications, etc., and a complete description of the Senate, Assembly, Congressional, Judicial and School Commission Districts of the State. Reliable forms are given, also the important court decisions.



JEREMIAH MASON.

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THE HON. JEREMIAH MASON

AND AN EPISODE OF LEGAL HISTORY IN NEW HAMPSHIRE.

THE transition to the form of government of a republican state from the colonial form in our country, in which the Legislature was the General Court, and its members the Supreme Judiciary, was marked by many anomalies. Some of these were in consequence of the inability of the members of the Legislature to divest themselves of the idea that the judicial system established by the new constitution was of such a nature that it could not stand alone as an independent department of government.

Even up to the present time there are, in the country at large, frequent appeals to the Legislature by one or another party in a litigation, demanding that a court be restrained, or ordering certain action out of the usual course; or petitions making vengeful charges against justices. Persons of a cast of mind apprehending imperfectly the principles of justice, and having but a meagre conception of the political measures necessary to public safety and thrift, are greatly given to plans of having the courts so reconstructed that they will sustain the action of their class, however narrow and partial it may be. We have escaped for the present the debasement of the Supreme Court of the nation, distinctly threatened in the late, and in the present, political campaign; but the mischievous taint still remains, endangering the future of the country.

In earlier times this element in the body politic was sometimes too impatient to seek a remedy for their supposed grievances through the orderly routine of elections or of constitutional reform; and when the Legisla-

ture could not be induced to interfere with the courts, violent action was taken against them directly, as in Shays' Rebellion in Massachusetts, the whiskey insurrection in Pennsylvania, and the anti-rent disorders in eastern New York State.

In New Hampshire the contest between sound principles and presumptuous ignorance did not reach the stage of civil violence because the latter happened to be in a majority in the Legislature for several years, during which time it frequently interfered with the regular conduct of the courts. Perhaps the most glaring instance of this kind occurred in 1792 and 1793, in the so-called "pig acts," which proved a crisis in fatuitous action in this direction; and in it the noted Jeremiah Mason was a prime factor.

Mr. Mason, then under twenty-four years of age, had recently opened a law office in the town of Westmoreland, having been admitted to practice in the New Hampshire courts in September, 1791. Admission at that time was regulated by the rules of the bar, which required three years of study within the State; but Mason had not studied at all in New Hampshire. On graduating from Yale College he had entered the office and the household of Mr. Baldwin, in New Haven, whose son was subsequently Governor of Connecticut. Becoming persuaded that Vermont would prove a more profitable field, young Mason, a year later, entered the office of Gen. Stephen Rowe Bradley, in Westminster, who was afterward a Senator from Vermont in the National Congress. General Bradley's principal law competitor in

his own county was Luke Hall, subsequently Chief Justice of the State.

At this period Justices of the Peace in Vermont had a large civil jurisdiction, which was final when under a certain amount of damages, consequently there was in these Justices' Courts a great deal of petty litigation. The future Senator and the embryo Chief Justice often met in these courts, where the discussions were not in general adapted to soften exacting dispositions nor to soothe acrimonious feelings, and the pair were in a perpetual feud that did not even permit of their speaking to each other.

Soon after Mason entered his office, General Bradley, finding it necessary to transact some business at a distance on a court day, requested Mr. Mason to attend to his matters, which the latter undertook with much reluctance. Mr. Hall expected this would be much to his advantage in a case in which Bradley was the opposing counsel, but Mason proved the winner.

General Bradley was much gratified at this evidence of his pupil's ability, and said to him that his own engagements were now so numerous and important that he could not attend personally to these petty causes and he forthwith proposed to give Mr. Mason the whole charge and management of all the business before the Justices' Courts, with all the fees in litigated cases, and one half the income (taxed costs) in those not litigated.

This was a very advantageous arrangement for a student who desired money more than erudition, and Mr. Mason earnestly desired to relieve his father of the burden of his support; but all such practice must be detrimental to the judicial system. Mason himself has said that it was a proposal "grossly improper" for a lawyer to make or for a student to accept. However, accept it he did, and using his own words, "launched out on a sea of pettifogging."

After a year and eight months in this place he applied for admission to the bar, General Bradley (as he learned later) being

his most strenuous opponent. The rules required two years of study in the State, but the matter was decided on the principle of equity, and he was admitted in June, about three months previous to his admission in New Hampshire.

For the year and a half in which he acted for General Bradley in the Justices' Courts he had done a considerable business. He says of himself in this position, "I knew very little law, but that was the less necessary, as most of my opponents knew not much more, and the Judges I addressed, none at all."

Soon after his admission to the Vermont bar he began to think favorably of New Hampshire as a place to commence practice on his own account. Vermont, he says, was under some reproach for the manner of her separation from New York, a large proportion of the people were poor, and the courts and the bar inferior in tone to those of New Hampshire. He had become acquainted with the several members of the bar in the county of Cheshire, N. H., who assured him that there would be no objection to his admission. Perhaps the result was attained the more easily from his purchase of the farm of Colonel Moore, a lawyer who desired to move to another part of the country.

Small professional business flowed in upon him in great abundance in his new location, two hundred and two suits having been commenced by him in the Court of Common Pleas during his first year, besides a vast number of writs returnable before Justices of the Peace; yet, during the third year the number of suits was only two hundred and fifty-seven. The cause of this immediate popularity was the good reputation he had brought with him, together with his course at the outset of his residence here.

Thinking himself very kindly treated by the bar, in his admission without conditions, Mr. Mason gave them a fine supper. It was presided over at his request by Judge Champney, of New Ipswich, who, at the close of the

prolonged repast, called on the new member to stand forth. On his complying, the venerable Judge delivered to him a charge, accompanied by the right hand of fellowship.

Colonel Moore, to whose place and practice he succeeded, was a man of ability, but too fond of strong drink. He was a graduate of Cambridge (Harvard) College at a period when the institution "was more distinguished," wrote Mr. Mason, "for producing good fellows than good scholars." Moore, with much benevolence of disposition, was very dissipated and very popular. He had procured the establishment in the town of a lodge of Free Masons, of which he was Master, and he earnestly advised young Mason to join this lodge. "Accordingly," says the latter, "I went to several of their parties, and, fortunately for me, was disgusted with their coarseness and rude manners. To get out of the scrape, I gave them as good a treat as I could at my cottage, and had no more to do with them, assigning for my excuse that my time was so entirely occupied with my business and my studies that I had none to spare. From the Masonic lodge I kept free."

It appears by this that the young man considered himself a better Free Mason in a lodge exclusively his own, and the people appear to have adopted a similar view.

It was during the earlier part of his residence in Westmoreland (of three years only) that a man came to his office seeking to prosecute for larceny an impecunious neighbor, who, during his absence, had taken away two young pigs the complainant had to sell. Mr. Mason was out of town, and the student who attended to the office business, doubting the propriety of a charge of theft, advised an action for trover. This was commenced, the two pigs being therein alleged to be of the value of one dollar. The Deputy Sheriff, in serving the writ, found no person at the house, therefore tucked the summons between the door and its sill, where he thought it entirely safe. The plaintiff, who was a

near neighbor, saw this done, and as soon as the officer was out of sight, he went and stole the summons.

The man who had taken the pigs, entirely unaware of the action against him, did not appear at court, and was consequently defaulted, and the first news he had of it was an execution. He made a great outcry against the court amongst his neighbors, which brought out the fact that another person had seen the taking of the paper from under the door. The victim then went to Mr. Mason with his complaint. Finding that the summons had really been stolen, Mr. Mason offered to have the judgment and execution cancelled, and to let him have a trial for the pigs.

Whatever his offense might be his neighbor's against him was more culpable, he thought, and he was not alone in his view. Consequently he rejected the fair offer of Mr. Mason, and applied to the Legislature—then in session—to remedy his grievance.

Without notice to the other party, the Legislature immediately passed an act directing the Magistrate to cite the plaintiff before him, set aside the default and try the action, and to allow to either party an appeal. Thus the Legislature was guilty of inciting useless litigation, and of debasing the Judiciary.

The plaintiff was cited, and Mason appeared for him, denying the power of the Legislature to pass the act, and making an argument on the constitutional restraints of legislative power. The opposing counsel replied by portraying the audaciousness of an attempt by an inferior magistrate to question the power of the Supreme Legislature.

The Justice, jealous of his official dignity, and desirous of sustaining his high reputation for courage (having been an officer in the Revolutionary army) promptly pronounced the act utterly void, and refused to obey it. The claim for an appeal was also disallowed by the Justice, who said that as the whole proceeding was void he had no

rightful power to record a judgment, nor to grant an appeal. Thus ended the first act of this farcical drama.

The persistent purloiner of the pigs, refusing to accept defeat, obtained from the sovereign Legislature, at its next session, another act, directing the Court of Common Pleas to try the defaulted action. Before that tribunal the parties again met, and, after lengthy argumentation, the Court deliberated. Mason's argument had again prevailed, and this Court also determined to have nothing to do with the matter.

By this time the "pig action" and the "pig acts" had attained to much notoriety in legal circles in the State. It brought all such special acts of the Legislature, interfering with the regular course of the courts of law, into ridicule and contempt. In consequence, this mischievous practice was, in New Hampshire, fairly laughed out of existence.

Mr. Mason was a fluent speaker and studied his cases very diligently. In court his manner was respectful, his statements lucid, and his argument always strong. Perhaps, too, somewhat of his success was owing to his physical appearance. His powerful mind was enshrined in a giant frame. In his early professional period he was notably tall and apparently slender. A fugitive anecdote of him is remembered as follows: Traveling once in a sleigh after a great snowstorm, he met a countryman in a similar conveyance. Mr. Mason turned his horse and sleigh as far to one side as he conveniently could, and courteously requested the other party to do the same. The man was sturdy of figure and stubborn of countenance, and taking Mason's courteous speech as the sign of a craven spirit, he refused to budge an inch, and demanded a free way for his vehicle.

At this Mr. Mason's eyes flashed. The day was cold and he had sunk deeply in the robes of his high-back sleigh, but now he drew himself up and sat erect on the seat for a moment, then began slowly to divest himself of the wrappings, and to get upon his feet, displaying his proportions to the surprised countryman, who exclaimed in a tone of alarm, "You needn't rise any more, Mister. I'll turn out."

In his prime, Mr. Mason was six and a half feet in height, well proportioned in body but with a slight stoop, — not uncommon in tall professional men.

He was appointed Attorney General in 1802, and it has been said of him that he was "the first Attorney General of the State who comprehended the responsibilities of the office." Subsequently he was offered the Chief Justiceship of New Hampshire, but declined the appointment.

From 1794, when he changed his residence to Portsmouth, to his removal to Boston in 1832, his life flowed smoothly on in constant and successful practice of the law, varied only by four years of service — from 1813 to 1817 — in the National Senate, and an occasional term in the Legislature. He died in 1848 at the age of eighty years.

Following his removal to Portsmouth, Mr. Mason had for his professional opponents at one time or another, nearly all of the leading lawyers of his own and neighboring States, Daniel Webster being his antagonist in many cases.

Hon. George S. Hillard, in stating his estimate of Mason, once said that the difference between him and Webster was, that "Mr. Mason was a great lawyer, and Mr. Webster was a great man practising law."

DR. JOHNSON ON LAW AND LAWYERS.

IT must always be interesting to lawyers to hear the opinion of an intelligent layman on them and their profession, especially when the layman is one with the robust good senses of a Dr. Johnson, for too many laymen talk sad trash about the law and its professors. Even a man like the poet Wordsworth, himself the son of a country solicitor, could write like this in "A Poet's Epitaph":

A lawyer art thou? — draw not nigh;
Go, carry to some other place
The keenness of that practised eye,
The hardness of that sallow face.

This kind of abuse is cheap; retaliation easy:

A poet art thou? Scarecrow fly,
And carry to some other clime
The frenzy of that rolling eye,
The twaddle of that tuneless rhyme.

Johnson was full of prejudices, but on law and lawyers he was remarkably lucid and just. "Lawyers," he said, "know life practically. A bookish man should always have them to converse with. They have what he wants." It is a curious fact that at the age of fifty-six "the great lexicographer," as Miss Pinkerton in "Vanity Fair" delighted to call him, had thoughts of studying the law himself, and actually composed a prayer—and a very good one, too—that his study of it might be sanctified "to direct the doubtful and instruct the ignorant, to prevent wrong and terminate contention." It is a matter for real regret that he never carried out his design. How well we can picture the ponderous Doctor as a learned Queen's (or rather King's) Counsel, refining on his points to the Court, or haranguing a jury while "words of wondrous length and thundering sounds" amazed the gaping occupants of the jury-box!

A friend of Dr. Johnson's once said that he was like a ghost, who never spoke until he was spoken to—the truest description of him, the Doctor said, ever given; and it is to the initiative of the inquisitive Boswell, of course—the admiring showman—that we owe the Doctor's dicta on the law and lawyers. Boswell was going to the English Bar, or rather playing at it, and a gay friend, he said, had advised him against being a lawyer, because he would be excelled by plodding blockheads. (By the way did not this brilliant contemner of blockheads move once for a writ "*Quare adhæsit pavimento?*") "Why sir," said Dr. Johnson "in the formulary and statutory part of the law a plodding blockhead may excel, but in the ingenious and rational part of it a plodding blockhead can never excel." "You must not indulge," went on the Doctor, "too sanguine hopes should you be called to our Bar. I was told by a very sensible lawyer that there are a great many chances against any man's success in the profession of the law. The candidates are so numerous, and those who get large practices are so few. He said it was by no means true that a man of good parts and application is sure of having business, though he, indeed, allowed that if such a man could but appear in a few causes his merit would be known, and he would get forward; and that the great risk was that a man might pass half a lifetime in the courts and never have an opportunity of showing his abilities." This is as much a melancholy truth to-day as it was a hundred years ago. "What means may a lawyer legitimately use to get on?" Nice questions of casuistry arise. "A gentleman," says Boswell, "told me that a countryman of his and mine, Wedderburn—afterwards Lord Loughborough—who had risen to eminence in the law, had when first making his way solicited him to get him employed in city causes.

Johnson: "Sir, it is wrong to stir up lawsuits; but when once it is certain that a lawsuit is to go on, there is nothing wrong in a lawyer's endeavoring that he shall have the benefit rather than another."

Boswell: "You would not solicit employment, sir, if you were a lawyer?"

Johnson: "No, sir; but not because I should think it wrong, but because *I should disdain it.*"

This is a good distinction which will be felt by men of just pride.

He proceeded: "However, I would not have a lawyer to be wanting to himself in using fair means. I would have him to inject a little hint now and then to prevent his being overlooked."

This is a very tolerant view of professional etiquette. When the great Duchess of Marlborough called at young Murrays's chambers and found him out—we may presume he was engaged in drinking champagne with the wits—the imperious dame said, on meeting him next: "Young man! if you want to rise in your profession you must sup out." Boswell had an uneasy feeling that he must give up supping out, and he put it to Johnson whether a very extensive acquaintance in London might not be prejudicial to a lawyer.

Said Johnson: "Sir, you will attend to business as business lays hold of you. When not actually employed you may see your friends as much as you do now. You may dine at a club every day, and sup with one of the members every night, and you may be as much at public places as one who has seen them all would wish to be; but you must take care to attend constantly in Westminster Hall, both to mind your business, as it is almost all learnt there (for nobody reads now), and to show that you want to have business. And you must not be too often seen at public places, that competitors may not have it to say, 'He is always at the playhouse or Ranelagh, and never to be found at his chambers.' And then, sir,

there must be a kind of solemnity in the manner of a professional man. I have nothing in particular to say to you (Boswell) on the subject. All this I should say to anyone. I should have said it to Lord Thurlow twenty years ago." This point about solemnity of manner recalls a saying of Horne Tooke. He once remarked to a serious and successful friend, "We have reversed the ordinary laws of Nature. You have risen by your gravity; I have sunk by my levity."

Sir Matthew Hale once said that it was as great a dishonor as a man were capable of that he should be hired for a little money to say otherwise than he thought. But the truer and juster view of the ethics of advocacy is well expounded by Johnson.

"We talked of the law. Sir William Forbes said he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one."

"Sir," said Dr. Johnson, "a lawyer has no business with the justice or injustice of the cause which he undertakes unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the Judge. Consider, sir, what is the purpose of Courts of Justice? It is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the Judge, and determine what shall be the effect of evidence, what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power in arranging evidence and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself if he could. If by a superiority of attention, of knowledge, of skill, and a better method

of communication he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage on one side or the other, and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though were it judicially examined it might be found a very just claim.

Boswell feared that the affectation of warmth in a client's cause might produce habitual dissimulation.

"Why, no, sir, a man who is paid to tumble—the metaphor is not flattering to the lawyer—will not go on tumbling when he is not to be paid for it."

Lawyers cultivate the diffuser graces of rhetoric. They are sometimes accused even of garrulity. "It is unjust, sir," said Johnson, "to censure lawyers for multiplying words when they argue. It is often necessary for them to multiply words." "This" (he said, referring to some point) "you must enlarge on when speaking to the committee [of the House of Commons]. You must not argue there as if you were arguing in the schools. Close reasoning will not fix

their attention. You must say the same thing over and over again in different words. If you say it but once they miss it in a moment of inattention."

On many other legal questions, on entail, on Sunday consultations, on reports of cases, the Doctor's opinions are wise and weighty. No one was more rapid in detecting a fallacy or more ruthless in exposing it. "I repeated to him," says Boswell, "an argument of a lady of my acquaintance who maintained that her husband having been guilty of numberless infidelities released her from her conjugal obligations because they were reciprocal."

Johnson: "This is miserable stuff, sir. To the contract of marriage, besides the man and wife, there is a third party—society—and if it be considered as a vow, God; and therefore it cannot be dissolved by that consent alone. Laws are not made for particular cases, but for men in general."

This is a truth too often forgotten, especially in matrimonial squabbles. Boswell urged that the lady did not want a dissolution, but only license for her gallantries.

"This lady friend of yours, sir," said Johnson, "seems very fit for a —."

LAW JOURNAL.



CHAPTERS FROM THE BIBLICAL LAW.

VI.

THE CASE OF NABOTH'S VINEYARD.

BY DAVID WERNER AMRAM.

THIS case has been made famous in song and story on account of the magnificent dramatic effect with which it is told in the Bible, and more especially because of the manner in which the Divine wrath took vengeance upon the son of King Ahab for the crime committed by the father, illustrating by a shining example the words of the commandment, "For I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children, unto the third and fourth generation of them that hate me." But apart from the dramatic interest attached to this story, apart from its literary value and its usefulness as an illustration of certain ethical principles, it has numerous and interesting legal elements. The record of the case will be found in the first Book of Kings, chapter xxi, and second Book of Kings, chapter ix, verses 22 to 26.

Naboth, a wealthy landowner in Northern Palestine, and one of the leading men of the city of Jezreel, owned a vineyard next to the grounds surrounding the summer palace of Ahab, King of Samaria. The King, on one of his visits to his summer palace, cast a covetous eye on the vineyard of Naboth, and, having sent for him, said, "Give me thy vineyard that I may have it for a garden of herbs, because it is near unto my house, and I will give thee for it a better vineyard than it, or, if it seem good to thee, I will give thee the worth of it in money." This was a fair proposition judged from a modern point of view, but not so to Naboth whose natural attachment to his patrimonial estate was strengthened by the immemorial custom among the Hebrews, of preserving the es-

tate in the family, unless dire necessity required its alienation.

Originally lands were entirely inalienable, but with the growth of commercial life under the reign of the Kings, concessions were gradually made in favor of the alienation of landed property, with a proviso, however, that in the year of the Jubilee, all lands were to revert to the family of the owner who had alienated them. To men like Naboth who had no reason for parting with their estates, the very thought of giving away or selling their estate was akin to sacrilege, and thus Naboth answered the King, "It is forbidden me by Jehovah that I should give the inheritance of my fathers unto thee," and the King had to be satisfied with this answer. The Kingship was still something new in Israel and the ancient liberties of the people had not yet been entirely destroyed by monarchical rule.

The King, having returned to his capital, showed marked signs of his displeasure at the treatment that he had received from Naboth. His wife, Queen Jezebel, whose name has since become a synonym for deviltry, asked him, "Why is thy spirit so sad that thou eatest no bread?" The King then told her the story, saying that after he had made his offer to Naboth, the latter replied, "I will not give thee my vineyard."

Now, Jezebel was the daughter of a Phœnician King, the King of Sidon, who ruled as an absolute oriental despot. Jezebel, who had been brought up in her father's house to look upon the mere whim and caprice of the King as higher and stronger than any law or custom, lost patience when

her husband meekly told her of Naboth's refusal of his request. With bitter irony, she said to him, "Dost thou now indeed reign over Israel?" Then she added, "Arise and eat and let thy heart be merry, for I will give thee the vineyard of Naboth, the Jezreelite."

The manner in which she kept her promise showed how deep were the inroads which royal usurpation had made upon the ancient liberties of the people. It must be premised that under the ancient constitution of the Hebrew Commonwealth, each community was practically independent and was ruled by its own elders. With the establishment of the Kingship, new officials appear, namely, the royal judges who sit with the elders in the various cities of the Kingdom. As the Kingship grew stronger, the autonomy of the elders declined. By force or by intrigue their authority was undermined, and as we see in the present case under royal influence corrupt men were put into office, and became pliant tools in the hands of their royal masters.

The Queen evidently knew upon whom she could rely to carry out her purpose, for she issued orders in the name of the King and sealed them with his seal, and sent them to the elders and princes who were in Naboth's City and who sat with him in the local council.¹

It is not to be presumed that she issued these writs or orders to all the elders indiscriminately. She probably had several men in office in the town of Jezreel upon whom she could rely to carry out her orders. They were as follows :

¹ The end of the 8th verse is translated as though the orders or writs of the Queen were sent to the elders and to the princes that were in Naboth's City and *dwelt there with him*. The word "dwelling," translated literally means "sitting" and seems to be used in this place in the technical sense similar to that in which we use the word when we speak of the judge sitting to try a case. Naboth was himself one of the council and the Queen's writs were directed to the other members of the council who sat with him. They were his peers and they were to try him.

"Proclaim a fast and place Naboth in the assembly of the people and let him be confronted with two worthless fellows that they may testify against him, saying, 'Thou didst blaspheme God and the King,' and then let him be taken out to the place of execution and be stoned to death."

The order to proclaim a fast is not to be taken literally. It probably meant nothing more than to gather an assembly for some important business, and this term was probably a survival of the time when all such assemblies were commenced with a period of fasting.

The order to place Naboth in the assembly was in fact an order to place him on trial by his peers, the members of the council of elders who "sat with him." Her order to have witnesses suborned to perjure themselves, and the fact that her orders were carried out to the letter, throw a clear light upon the administration of the law under a despotic ruler. It is probable that in her secret instructions to her tools, she told them what Naboth had actually said to the King, and how this might be perverted into blasphemy and *lèse-majesté*.

Although the Queen thus violently debauched justice, it was done according to strict form of law, because as was said before, the royal power in Israel was not yet strong enough to violate all the traditions of the people, and to accomplish its ends by arbitrary measure without regard to the common forms of procedure. The elders of Jezreel having received their orders from the Queen, proceeded to carry them out to the letter. They gathered the assembly and placed Naboth on trial, produced the perjured witnesses, who testified against Naboth in accordance with her instructions, "Naboth has blasphemed God and the King," and thereupon he was convicted and taken to the common place of execution, without the city, and there stoned to death.

Naturally the elders in this case contented themselves with following the mere form of

procedure, and disregarded all the rules of practice which the Jewish law had established for the protection of one charged with crime, for it was the duty of the judges in criminal cases to examine and cross-examine the witnesses carefully and to give the accused the benefit of every doubt. In this case the examination seems to have been perfunctory and was merely intended to satisfy the multitude of onlookers and townsmen of Naboth.

The judicial murderers having carried out the Queen's order made their return in due form, to wit, "Naboth is stoned and is dead."

As soon as the Queen received this message, she said to Ahab, "Arise and take possession of the vineyard of Naboth, the Jezreelite, which he refused to give thee for money, for Naboth is not alive but is dead." Thereupon, Ahab went down to Jezreel for the purpose of taking possession of the coveted land.

The question arises, By what right did the King take possession of the land upon the death of its owner? If Naboth had children, they would inherit; in the absence of children his nearest kinsmen would inherit, so that the inheritance of his fathers would not pass out of his family or tribe. There evidently were several versions of this affair current among the people, for in the passage in second Kings, chapter ix, verse 26, we find reference to the fact that Naboth did have sons and that they also fell victims to the covetousness of the King, and were murdered by the Queen's command.

It was the law, anciently, that the children were put to death for the crime of the parent, until the law was promulgated, "The parents shall not be put to death for the children, and the children shall not be put to death for the parents; each man shall be put to death for his own crime."¹

As Naboth had been convicted and sen-

¹ Deuteronomy, xxiv, 16. This law, found in the Deuteronomic code was not promulgated until the reign of King Josiah of Judah, about the year 624, before the Christian era. The consensus of opinion of modern Biblical scholars assigns the book of Deuteronomy to this date.

tenced to death, his children suffered the same punishment. As to the right of the King to take possession of the inheritance, this may have been founded either upon his kinship with Naboth or upon his right as *ultimus haeres* in default of lawful heirs. There is nothing in Jewish law to warrant the belief that the King or the State had any right to inherit property upon the death of the owner without lawful heirs, nor is there any evidence of forfeiture of the estate of the felon who has been convicted and put to death. We must therefore assume that the King's possession of Naboth's vineyard was simply the act of an autocratic despot. No doubt, Ahab himself would never have dared to take such a step in violation of the ancient custom and laws of his people, but Jezebel, whose character and training had left in her no conscientious scruples on this score, did not hesitate to establish a new precedent for the crown.

Although the people were, for the time being, placated by the apparent regularity in the form of the trial of Naboth, they perceived the motive for the prosecution as soon as the King took possession of Naboth's estate.

The Biblical account introduces the prophet Elijah talking with Ahab on the highway and denouncing his crime and threatening him with divine vengeance. "Thus saith the Lord, Hast thou killed and also taken possession? In the place where dogs lick the blood of Naboth, shall dogs lick thy blood, even thine." Ahab, overcome with contrition, humbled himself and did penance for the crime, and the prophet was then informed that the vengeance would not be taken in Ahab's day, "but in his son's days, will the evil be brought upon his house;" and later on (II Kings, chapter ix, verses 25 to 26), when his son, King Jehoram, was slain by Jehu, his body was thrown into the field of Naboth, the Jezreelite. "For," said Jehu to his companion, "I remember how that when I and thou were riding together, after

Ahab his father, Jehovah laid this burden upon him. 'Surely I have seen this day the blood of Naboth and the blood of his sons,' saith Jehovah, 'and I will requit thee in this very plat.'"

The words here put into the mouth of the prophet Elijah, threatening divine vengeance for Ahab's crime, probably expressed the indignation of the people at the enormity of the offense, and at the prostitution of justice by the King and Queen. It was such unlawful assumption of authority on the part of

the Kings that prevented the monarchy from flourishing in Israel. The old customs and laws which had been temporarily placed in abeyance during the reign of the Kings were revived immediately upon the fall of the Kingdom, and after the return of the Israelites from the Babylonian captivity, and still later, after the destruction of the second temple by Titus, the reign of law revived and reestablished itself among the ancient people.

"GRAND DAY" AT AN INN OF COURT.

BY LAWRENCE IRWELL.

MANY Americans have a very indistinct idea of English legal functions in general, but more especially of legal festivities, such as the precise share which "eating dinners" has in qualifying a student for the bar, the traditional fun of a circuit mess, and so forth. In addition, many persons, not only here, but in England, wonder how it is that men addicted to such grave pursuits as those followed by the members of the bar, are so much given to mirth and jollity and costly festivity. The answer to this is that, just in proportion to the mental tension superinduced by the demands of their calling, is the recoil of their minds in an exactly opposite direction after that tension.

Assuming, then, that the barristers of the Inn of Court, to which I belong, are not only a learned and laborious, but also, at suitable times, a convivial body of men, I propose to describe the proceedings in the Hall on the evening of a day when legal conviviality is believed to reach its culminating point, namely, on what is known as "Grand Day."

I may mention that during each of the four legal terms there is a Grand Day, but the Grand Day of Trinity Term is the grandest of them all, and is styled "Great Grand

Day." Also, that these days are observed in each of the four Inns of Court, namely, Lincoln's Inn, Gray's Inn, the Inner Temple and the Middle Temple. Trinity Term begins on May 20th and ends on June 19th, under ordinary circumstances. I assume that the Grand Day which I am about to describe takes place during this term at an Inn which, for reasons well known to every barrister, I shall call Blackstone's Inn.

It is a splendid summer evening, and as we approach our noble old Hall, both I and my companion soon perceive that something unusual is taking place. There is the crimson cloth laid down for the distinguished guests who are always invited upon these occasions; and near the entrance there is a little knot of spectators of all kinds, from the elderly gentleman to the newspaper boy. The carriages are beginning to arrive; and it is time to go inside the Hall. But there is something to be done before we get there. We must first enter one of the ante-rooms. Here there is a great crush owing to the invariable preliminary to every dinner at an Inn of Court—the "robing," as it is called; for benchers, barristers and students are all required to dine in gowns.

The portly-looking individual, wearing a gorgeous scarlet gown, who gives various directions, is the head-porter, and he is so called on the *lucus a non lucendo* plan, because he is seldom employed to carry anything, except perhaps a letter. In like manner, the women called "laundresses" who attend to the rooms ("chambers") in the Inns of Court, are so termed because they never wash anything at all, which in some instances is but too painfully true. But the "head-porter" is carrying something this evening, in the shape of an enormous baton with a silver knob big enough to produce about twenty dollars' worth of silver. Then there is another important-looking gentleman, of graver and more anxious demeanor, wearing a black gown, who seems to be the life and soul of the preparations generally, and who moves about with such alacrity as to suggest an approach to the ubiquitous. This individual is the head-butler, and of course his position is one of serious responsibility, especially on the present occasion. Being now robed, we enter the Hall. What a babel of tongues is here. "Have you got a mess?" is a question one hears on all sides. (An Inn of Court mess consists of four persons, the first man at the table being called the "Captain.") Then we hear, "Come and join our mess; I have a first-class place up here," from a young student. "Oh, but you'll be turned down," answers his friend with a slightly consequential air; and we see that the latter, by his sleeved and more flowing robe, is a barrister, although a very junior one; hence his tone of importance. "We sit by seniority on Grand Day," our learned young friend goes on to say, and languidly falls into a seat.

In a few moments a voice is heard addressing the languid barrister.

"When were you called, sir?" it asks. The voice proceeds from a form which might easily be that of the other's father, if not grandfather; but the question is put *pro forma*.

"Hilary '94," is the answer.

"Then I'm afraid I must trouble you to move, for I was called in Hilary '65." Then the student previously corrected, says, "That's right, turn him out for his cheek in coming up here," and the party of four moves leaving the man who was called in 1865 in temporary possession, until someone called at an earlier date comes along. Eventually, however, everybody is properly located.

There is an unquestionable aspect of distinction about the place this evening. The old Hall itself, in the centre of which is displayed the valuable silver of the Inn, seems to smile in the sunshine of the summer evening. Yet, as the light softly steals in through the stained glass forming the armorial bearings of distinguished members of the Inn long since passed away, I seem to feel a sort of melancholy, in spite of all the gaiety around, from the consideration — which insists upon forcing itself upon my mind — that the paths of law, like glory, "lead but to the grave." Moreover, the time-worn and grim-looking escutcheons of the old "readers" which crowd the wainscoted walls have a decidedly forbidding appearance, and I find it impossible to avoid heaving a little sigh as I look up and see in front of me the name and arms of, say, Gulielmus Jones, Armiger, Cons. Domi. Regis, Lector Anct. 1745, William Jones, Esquire, Counsel of our Lord the King, Autumn Reader, etc., and wonder how much that learned gentleman enjoyed his Grand Days in the period of comparative antiquity mentioned on his escutcheon.

My business, however, is strictly with the present, and as one of the features of Grand Day dinner is that the *mauvais quart d'heure* monopolizes almost an hour, I have ample time to look around before dinner and see what is going on.

It requires no great expenditure of speculative power to comprehend the nature of the present assembly, numerous though it is. Each member of it will readily and with considerable accuracy tell me who and what he

is by mere inspection upon my part. In truth, I am really face to face with a world as veritable and as varied as that outside, only compressed into a smaller compass. Here may be seen old, worn, sombre-looking men, some of them bending under the weight of years, and actually wearing the identical gowns — now faded like themselves — which adorned their persons when first assumed in the heyday of early manhood, health, high spirits and bright hopes. Among these old faces, there are some that are genial and pleasant ; but, beyond a doubt, I am in proximity to many of those individuals who help constitute that numerous and inevitable host with which society abounds — the unsuccessful and the disappointed in life. I see very clearly that upon many of these patriarchal personages the fickle goddess has persistently frowned from their youth up, and that they have borne those frowns with a bad grace and a rebellious spirit.

To this feast, also, have come those who began their career under the benign and auspicious influences of wealth and powerful friends ; yet many of these are now a long way behind in the race — have, in fact, been outrun by those who never possessed a tenth part of their advantages. Such men form a very melancholy group, and I gladly pass from them to another class of barristers. These are the men whose lives have been a steady conflict with hard work, and often with hard times, but who, uninspired by that devouring ambition which is so often met with in lawyers, have not experienced the disheartening and chilling disappointment which has preyed upon some of their rivals. These men, however, have seen many of their hopes and aspirations crushed ; but they have borne the grievance with patience and cheerfulness. They may have had a better right to expect success than some of their more sanguine brethren, but they have not sneered at small triumphs because they could not achieve greater ones, and they have never been ashamed to be generally recognized as

plodders. Most of them are gentlemen in every sense of the word — men of whom universities are proud, and who have also honored universities ; men who, if unknown to the world at large, have yet enlightened it ; men whose bright intellects have elucidated for the benefit of mankind the mysteries of science, or have contributed their full quota to literature, art or law ; and who, without having been large donors to so-called charities, have yet been genuine benefactors to their species. But in spite of all this, they are men who, destitute of the practical art of saving money, are quite often in want of it, although many of them earn large incomes. It is almost unnecessary to say that they have never condescended to ask favors of others, and they are content to live in their own peculiar way. The majority of them do not practice law.

Intermingled with such members of the Inn as I have just mentioned are their opposites — those who must be regarded as having been distinctly successful in their legal career. How bland are the smiles which light up their comfortable-looking countenances ! There is no lack of geniality here, and one feels certain that these gentlemen possess happy, if not hilarious temperaments, the buoyancy of which is never endangered by the intrusion of any such "pale cast of thought" as wears away the existence of some of the others to whom I have referred.

This species of "successful" barristers, fortunate though they are, must not be confounded with the men who are actually "at the top of the tree." The latter are usually men of remarkable power and indomitable energy, and the daily newspaper has made almost every Englishman familiar with their names. It is from this class that the judges are drawn, unless some exceptional qualification is required to enable the occupant of the bench to fulfil some of the new duties now demanded by the statutes. All "successful" barristers, of course, have had to fight, and those who have come to the front have possessed the

gifts of tact, energy, perseverance and a wide knowledge of human nature. Further, they must have had excellent constitutions, otherwise they would have succumbed to the worry and the long hours of labor before success was even visible in the distance. Many of these men become statesmen, and leave behind them names never to be forgotten. They are, in short, gifted, honorable men, whose promotion, first to the rank of Queen Counsel, and later to the bench, is a benefit to the community and a delight to their friends, because such promotion is always well deserved.

Observable also in the present assembly are several of what may be termed the purely ornamental limbs of the law, who are to be found in the Inns of Court and elsewhere. This class comprises the gentlemen of leisure who, although entitled to the designation of "barrister-at-law," make no pretensions to any great depth of legal learning, for they have had no experience as practising barristers. Nevertheless, many of them are administrators of the law as county magistrates. Lawyers are not always good magistrates, and many are the mistakes of the English "great unpaid." But whatever may be the shortcomings of those of whom I am now writing, one thing concerning them is quite evident — they are the best-looking and the best-dressed men in the Hall. Watch them greeting old friends and replenishing their stock of funny stories for retailing to admiring audiences elsewhere!

Lastly, there are the boys, ranging from the shy students who have only recently joined the Inn, to the youthful barristers who have just assumed the wig and gown. Some of the latter are engaged in detailing to eager and ambitious listeners the glories surrounding the first brief, while all are a little overburdened with the hopefulness which is peculiar to barristers who are too young to have done much waiting for briefs. To these youngsters the business of Grand Day appears tame in comparison with the high and substantial honors which they all believe to be in store for them in the future.

Ah! the future; that alluring period, so surpassingly enchanting to everybody who has not reached the age of forty.

Such is the assembly before me at Blackstone's Inn on Grand Day of this Trinity Term.

"Dinner," shouts the head-porter, who stands at the door with his great silver-headed baton in his hand. The use of this badge of office is now apparent, for as soon as he has enunciated the above-named welcome word, he brings the baton heavily onto the floor three times. Then slowly advancing up the hall, he acts as a sort of *avant-coureur* of a host which is gradually following him, gentlemen who walk two and two in procession, almost with funeral precision and solemnity. As they proceed, the previous loud hum of conversation is considerably lulled, and everybody is standing at his place. These are the Benchers of the Inn and their guests. The proper designation of the former is "Masters of the Bench" of the Inn. Each is called "Master" in place of "Mister"; and the chief of their body is the Treasurer, who holds office for one year only. The guests are invariably persons of recognized position in the region of law, science, theology, medicine, politics, etc. Occasionally a member of the royal family honors the Inn with his presence on Grand Day, and he probably requires no invitation, as some of the Queen's sons are members of certain Inns. Those who are not are sometimes invited to be present. The Prince of Wales is a Bencher of the Middle Temple, and he dined there on a certain Grand Day about twenty-five years ago. He made a humorous speech, in which he reminded his learned friends of the fact that Chancellor Sir Christopher Hatton opened a ball with Queen Elizabeth in that very Hall. One result of His Royal Highness's comic reminder was that upon his next appearance on Grand Day, some ten years later, no speeches were delivered in Hall.

The procession moves on, and as many of the visitors are recognized, the sound of

conversation recommences. As I watch the poets, painters, peers and pleaders pass by, I am troubled by the presence of a prosaic mentor whose demands are becoming troublesome. In other words, I am getting hungry. But I have not much longer to wait. The head-porter raps on a table three times with an auctioneer's hammer, and dead silence immediately ensues, and then "grace" is read by the Preacher of the Inn. After that we begin to eat. There is soup, fish, roast, poultry, puddings and pies, beer and champagne, as well as one bottle of any other wine, for each mess; and all for half a crown (about sixty-two cents). Everybody seems to know that the Inn is rolling in wealth, and nobody feels any compunction in assisting in the heartiest way in devouring the good things with which the tables are loaded.

In about an hour and a quarter the head-porter raps once more, afterwards proclaiming "Silence." When this has been secured, there comes another request to the assembly: "Gentlemen charge your glasses, and drink to the Health of Her Majesty, the Queen." The Treasurer then rises and says: "Gentlemen, the Queen," whereupon every man in the Hall stands up, and an enthusiastic shout of "The Queen" bursts forth. There is no more conservative body of men than the Bar of England, nor has the Crown more staunch or more devoted supporters than the gentlemen of the long robe. At the same time, no body of men has ever more firmly withstood any attempt to extend the royal prerogative to the injury of the people. The toast, "the Health of the Queen," is always drunk at these Bar gatherings with an amount of fervor which

betokens strong attachment to the Constitution; and on this particular occasion, the intensity and unanimity of the response reminds one of the discharge of a big gun.

As a rule, there is no speechifying in Hall, and there is none this evening. The custom is for the Benchers to take wine and nuts in one of the rooms known as "the Parliament Chamber." There some speeches are made, and the speakers are refreshed with the choicest products of the vineyard that money and good judgment can buy. Who would not be a Bencher?

As far as the ordinary portion of the assembly is concerned, dinner is over. Grace is said again, and the Benchers, followed by their guests, retire in the order in which they entered. But there is not quite as much of that grave air of solemnity about the procession as there was at its entrance; indeed, everybody looks and feels all the better for the good dinner which he has eaten. Neither the eminent visitors nor those of the Benchers who are popular with the members of the Inn are allowed to depart without a friendly cheer, and if some person happens to be very popular indeed, his name is shouted out in a fashion often bordering on the obstreperous.

The last two members of the retiring procession have now passed through the door of the Hall, the majority of those who have been dining generally follow them. A few of the "Ancients"—as the senior barristers are called—are left behind to finish their wine and their conversation; but by midnight the Hall and its immediate surroundings are once more deserted and silent.

LEAVES FROM AN ENGLISH SOLICITOR'S NOTE BOOK.

X.

NEMESIS OF A PRACTICAL JOKE.

BY BAXTER BORRET.

(Registered at Ottawa in accordance with the Canadian Copyright Act.)

WITH some persons the temptation to play practical jokes is irresistible; there is, however, a Nemesis which may be, for the time, lost sight of, but which surely dogs the footsteps of the practical joker. If, like Ishmael of old, his hand is against every man, every man's hand is surely against the player of practical jokes.

Probably few of the readers of the "Green Bag" remember the early days of the Volunteer movement in England. In one of the years immediately following the close of the Crimean War, Lord Lyndhurst made a notable speech in the House of Lords, one of his last great efforts, calling attention to the unprotected state of the coast of England in the event of any sudden invasion. It was that speech of the venerable ex-chancellor which roused the military ardour then dormant in the breasts of the peaceable citizens of England, and led to volunteer corps being formed in every important town. The County of Lancaster was the foremost in the field, and the old foggy who now pens these lines was among the earliest of enrolled volunteers. This was in 1858; very soon the whole country was fired with zeal for the defense of old England against all foes, a zeal which has continued to the present day, and has shown that there is still, even in the closing year of this century, fruit on the old tree ripe for the gathering when the supply is demanded. But at the commencement of the movement cruelly sarcastic remarks were hurled at the heads of the first recruits; John Leech was then in his prime, and his weekly contributions to *Punch* displayed the ardent volunteer in many a ludicrous

caricature, as he donned his new uniform to the dutiful admiration of the wife of his bosom, or strutted along the street to the irreverent sport of the crowd of small boys who, in London at least, have a keen perception of the ludicrous. I am not sure, but I fear, that with the passing of the Elementary Education Act this sense has not become deadened somewhat. I think it was Mr. Bernal Osborne, the Grimaldi of the British House of Commons, who drew a striking picture of the late Mr. Bodkin, Q. C. (the general contour of whose figure certainly belied his name,) as a newly recruited member of the Inns of Court Volunteer Corps, (now commonly known as "the Devil's own") crawling on his stomach through the undergrowth of Wimbledon Common in the execution of some strategic movement, and commended him to lay to heart the maxim "*in medio tutissimus ibis*," which the speaker freely translated "you will be far safer walking in the Middle Temple." Closely following on the Volunteer movement came the Beard movement; till then the members of the Bar were, to a man, close shaven. This latter movement spread to the clerks in the Bank of England, of whom it is told that the Court of Governors of the Bank issued a circular to the effect that while they were of course at liberty to please themselves out of bank hours, beards and moustaches could not be permitted to be worn during bank hours. And now the Beard movement has extended to the ranks of the clergy of the Church Militant, nay even to the Right Reverend occupants of the Bench of Bishops.

In the corps to which I had the honor of

belonging was a solicitor, I must not say a brother solicitor, for I was then but in *statu pupillari*. Captain Briggs was a most efficient officer, punctual at drill, and a veritable enthusiast in the cause in which he laid aside the toga to take up arms; but his heart was stronger than his brain, his progress in the profession of the law was slow; though a good officer of volunteers he was not a shining luminary in the legal firmament, and he was a gullible subject, and the victim of many a practical joke. Moreover, he was ambitious, and he earnestly coveted one of the few small prizes of the profession which were then open to solicitors, I think it was the appointment of clerk to some local bench of magistrates, and, being of good family, he hoped to secure influence in high quarters to get him the appointment. At that time Edward Geoffrey, Earl of Derby, was Prime Minister of England, and the most popular man in the whole of the County of Lancaster, and with great generosity he opened his beautiful Park of Knowsley for a grand field day of the volunteers of the county. Captain Briggs's excitement knew no bounds; night after night and every Saturday afternoon he was at the post of duty, and drilled his men to a point little short of perfection, in preparation for the great day. Alas for the vanity of all human speculation! Three days before the appointed field day he sickened with the measles, and instead of leading his corps to the field of mimic battle, he had to betake himself ingloriously to bed. Now the genial character of Lord Derby was a household word in the whole county, and made a slight stretch of lively imagination form the basis of a perfectly credible fiction. On Captain Briggs's first appearance at drill after recovering from his attack of measles, he was solemnly assured that when our corps marched past the saluting point Lord Derby was heard to exclaim: "Surely that is Captain Briggs's corps, but where is Captain Briggs?" and that as the genial Prime Min-

ister was informed of his absence, his Lordship had been heard to say "I am really very sorry to hear it. I have heard that he is a most efficient officer, and should have liked him to be presented to me." And a still prouder man was Captain Briggs when the next morning's post brought him a letter dated from Knowsley and signed "Derby," expressing his Lordship's deep regret at missing Captain Briggs from his place at the head of his corps, and his admiration for the way in which his men had acquitted themselves, and his sincere hope that the gallant Captain was again convalescent. Am I bound after the lapse of forty years to admit that I was the perpetrator of the joke? the wicked forger of the name of England's great Prime Minister? The bait took; worst of all, I myself was the first to whom the gallant soldier solicitor confided the news. It was a trying position for me, more especially when in the moment of triumph he told me that the great ambition of his heart seemed clearly within his reach, that he felt confident that with his Lordship's good offices he could rely on getting the appointment which he so earnestly coveted. Hard work had I to argue with him that a communication such as he had received could not be looked upon as personal, and ought not to be acknowledged by an immediate reply; still harder work had I to dissuade him from rushing off to the newspaper offices and putting forth to the public the letter which he had received (as he believed) from so august a personage as England's great Prime Minister. Do what I could, say what I would, arguments were unavailing, and I had, at last, to my own shame, and to his utter confusion to admit my forgery of the great man's name.

After this there was only one course open to me, to leave the corps and hide my diminished head in non-combatant obscurity. It made no great difference to me, as I was bound to go up to London to prepare for my final examination; so, bidding farewell

to all my fellow volunteers, I started for the metropolis, and gave the necessary notices to the Incorporated Law Society of my intention to submit myself for examination. I worked and read assiduously for a year or more and then presented myself for examination, answered the papers better than I expected, and then waited anxiously day by day to hear from the Secretary whether I had passed the examination, or had failed to do so. One evening as I was waiting in suspense I received at my lodgings a very formidable looking envelope bearing the stamp of the Law Society. I hastily tore it open to learn my fate, and to my no small surprise found within it a letter from the Secretary informing me that the committee of that learned society required me to attend before them at their next meeting "to explain certain circumstances of a very disagreeable nature which had been brought to their notice, and which, unless explained to their satisfaction, would prevent my ever being admitted on the rolls of the court;" according to the best of my recollection those were the words. I was stupefied, struck dumb. I racked my poor brains to guess what the circumstances of a disagreeable nature could be to which the letter referred. Professionally I had a clean record, no ill-natured dog could wag his tongue to my discredit; I had not been guilty of "cribbing" at the examination; I had no stain on my private character that I could think of; I had never appeared in any of Her Majesty's courts except in my proper place as professionally concerned; I had never "been in trouble" as it is politely termed; I had never wronged man or woman that I could lay to my conscience, except (and here it burst upon me like a flash of lightning at summer midnight) Captain Briggs. Could he have been so despicably mean after my straightforward and ingenuous confession, even though he were smarting (as I knew he was) under the disappointment of not having succeeded in getting the post he cov-

eted,—could he have been so despicably mean as to go behind my back, and seek to injure my whole life by bringing before the committee of the Law Society so absurd, but, as I felt bound to admit, so very awkward a circumstance as my having improperly made use of the signature of the Prime Minister; to bring this all before the august body of men, the learned heads of the profession, in whose hands lay the hopes and fears of all my future, and blast my whole career in revenge for one harmless though foolish practical joke? I spent a terrible night; the thought of all my five years of work being thrown away, the grief that would fall on the loved ones at home, and also on another loved one who did not then live at my home; all these things burst upon me in their full and fearful array; for, hope as I might, I could not feel sure that so staid and upright a body of men as the committee could be persuaded to look leniently on a palpable act of forgery, and that of the name of the Prime Minister. I relieved my feelings by sitting down and penning a furious outburst of vituperation on Captain Briggs. My temper got the better of my brain, and I made very free use of the English language in expressing my indignation at his malicious conduct, and while the fit of fiery wrath was hot upon me I went out and posted my letter, and then tried to sleep, which, of course, I found it quite impossible to do. Very early the next morning, before the world was awake, I dragged my weary limbs many miles out of London into the suburb in which the senior partner of the firm, in whose office I had spent the last year of my articles, resided, who was himself a member of the committee. Greatly concerned was he when I told him my story, and produced the letter of the Secretary; faithfully he promised me he would put everything else on one side, and inquire into the whole matter, and see what could be done for me; one more kindly thing he did for me, he insisted on my sitting down with

him at his breakfast table, at which we were joined by his son, who was his junior partner. The latter, to my surprise, began to laugh at the episode, and asked me whether I had ever told the story of Captain Briggs's discomfiture to any of my friends in London, and I had to confess that on a recent evening I had been relaxing my studies with a pleasant supper with congenial friends, of whom one was a fellow clerk in the office, and that, by way of capping some of the excellent stories told by one and another of our convivial party, I had told them the story of the joke played upon my gallant but gullible volunteer officer. He advised his father not to see the Secretary of the Law Society until he had made his own private inquiries in the office. Half an hour after arriving at the office I heard unusual sounds of mirth which seemed to me most unseemly in that consecrated temple of learning and industry, and the shouts of my fellow clerks told me but too plainly that I had been made the victim of a practical joke, as completely as ever Captain Briggs had been, and I am sure the Captain never felt smaller than I myself felt at the moment. Worst of all, I had to sit down and pen a most abject apology to the Captain for the

furious letter of the previous evening, and to explain to him that I too had been made to suffer the consequences of a practical joke, with the additional mortification of its being known all over the office, so that my case was much worse than that of my former victim.

And here let me end my story with two very sound pieces of advice to the younger readers of the "Green Bag." 1. Never play practical jokes; the inevitable Nemesis will be sure to overtake you sooner or later. 2. Never write furious letters; or rather I would say, whenever you are tempted to write a furious letter (and I admit that sometimes the temptation is well-nigh irresistible, and the penning of the fiery epistle is a deliciously satisfying safety valve for letting off the superfluous steam) write it by all means, but do not post it until you have slept upon it.

My confusion was, I am glad to say, short-lived; the next day I was receiving the hearty congratulations of my fellow clerks on the receipt of another letter, this time a genuine one, from the Secretary of the Law Society, announcing that I had satisfied my examiners, and that he was prepared to admit me on the rolls of the court.



THE COURT OF APPEALS OF KENTUCKY.

IV.

BY JOHN C. DOOLAN OF THE LOUISVILLE, KY. BAR.

WITH the retirement of Chief Justice Quigley, Judges Pryor and Lewis again became in turn Chief Justice of the Court during the last two years of their respective terms. On January 1, 1899, John P. Hobson was sworn in as successor to Judge Lewis and Judge James H. Hazelrigg became Chief Justice of the Court.

This brings us to a sketch of

THE COURT OF APPEALS AS IT IS AT PRESENT CONSTITUTED.

The lawyer who undertakes to sketch the lives of the Judges before whom he practices has a delicate task to perform, however pleasant it may be.

On the one hand, he must shun the semblance of eulogy, lest it be mistaken for the fulsome flattery of a sycophant. On the other, he must avoid the injustice of withholding from merit that tribute which is its just due wherever found.

The proper course and the only one consistent with good taste is simply to state, as far as possible, the leading facts in the life and work of each Judge, and leave to the fu-

ture to determine the title each has to judicial fame.

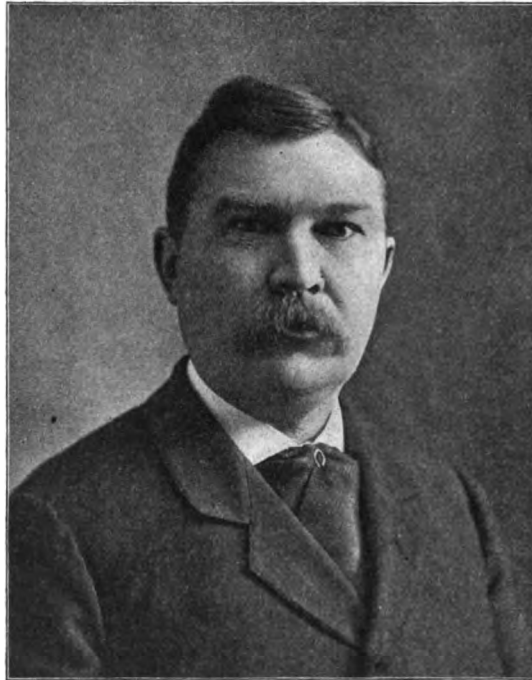
The Court of Appeals of Kentucky is now made up of seven Judges, each of whom is serving his first term in the Court. The oldest in commission is the present Chief

Justice, James H. Hazelrigg. His associates are Judges Thomas H. Paynter, B. L. D. Guffy, George DuRelle, James D. White, A. R. Burnam and John P. Hobson.

The term of Chief Justice Hazelrigg will expire January 1, 1901; the terms of Judges Paynter, Guffy, DuRelle and White expire on January 1, 1903; Judge Burnam's term will expire on January 1, 1905; and Judge Hobson's term on January 1, 1907.

Under the provisions of the present

constitution, the Judge longest in commission is made Chief Justice and if the term of service of two or more Judges be the same, they shall determine by lot among them who shall be Chief Justice. Accordingly after January 1, 1901, either Judge Paynter or Judge Guffy, if then living, will be Chief Justice, Judges DuRelle and White having been



JAMES H. HAZELRIGG.

chosen to fill vacancies and therefore not having the same term of service. The language of the present constitution thus differs from the last which provided that the Judge "having the shortest time to serve" shall be Chief Justice.

JAMES H. HAZELRIGG.

Chief Justice Hazelrigg was born in Montgomery County, Kentucky, of a long line of distinguished ancestry, on December 6, 1848. Until he was fifteen years old he lived on his maternal grandfather's farm, and attended the country schools during the winter months. When sixteen years of age, he joined the Confederate Army and served with his regiment to the end of the war. In 1867 he entered the Kentucky University at Lexington, and in 1871 he graduated from that institution.

He studied law under private instruction and came to the bar in 1873. He held several positions of trust and responsibility in his county, and in 1892 he was nominated by the Democrats for Judge of the Court of Appeals. After a vigorous campaign, he was by force of his recognized ability and personal popularity elected over his opponent, Chief Justice William H. Holt.

He took his seat on the bench in January, 1893, and though the youngest member of the Court, he soon gained a reputation for judicial capacity and for logical powers of

discrimination. This reputation has increased year by year until now his opinions place him in the front rank of the able and efficient Judges who have presided over the Court.

When Chief Justice Hazelrigg was first elected, the Court of Appeals consisted of four Judges. He is the last of the Judges chosen under the old regime before the number of Judges was increased to seven and the Court divided into sections. His record

has been an honorable one and he has written many opinions showing great research and learning.

THOMAS H. PAYNTER.

Judge Thomas H. Paynter was born in Lewis County, Kentucky, on December 9, 1851. He was educated at Center College, in Danville, Ky. At the conclusion of his collegiate course, he took up the study of law and in 1873 he was admitted to practice. He located in Greenup, Ky., and became one of the leading lawyers



THOMAS H. PAYNTER.

of that section of the State. In 1889 he was elected to Congress from his district and thereafter he was twice reelected, serving in all six years. In the summer of 1894 he became a candidate for Judge of the Court of Appeals, defeating for the Democratic nomination Hon. William Goebel, whose name is now well known throughout the country in connection with the disputed governorship of Kentucky. He was elected in November of that year, and thus became one of the first Judges of the re-

organized court. While he was in Congress, he served with great credit on the Judiciary Committee of the House of Representatives. Hon. H. St. George Tucker of Virginia, one of his associates in that committee, before Judge Paynter had ever taken his seat in the court, said of him that he possessed the judicial temper in the highest degree and he predicted for him a fine record as an able and impartial jurist.

In his opinions, Judge Paynter has shown great research and an accurate knowledge of legal principles and their application.

His dissenting opinion in the "Bank Tax Cases" that came before the Court of Appeals in June, 1895, was a masterly argument in favor of sustaining the taxes assessed on certain banks in accordance with the provisions of the new constitution. Two years later, the same question again came before the Court of Appeals and this time it re-

versed its ruling, Judge Paynter delivering the opinion of the court in practically the language of his previous dissent.

Eventually the question came before the United States Courts and the United States Circuit Court for the District of Kentucky, composed at the time of Justice Harlan and Judge Taft and Judge Lurton and the United States Supreme Court both adopted Judge Paynter's view of the law.

This one instance is mentioned to show the fulfillment of Mr. Tucker's prediction.

Many other notable opinions might be cited, but time and space forbid.

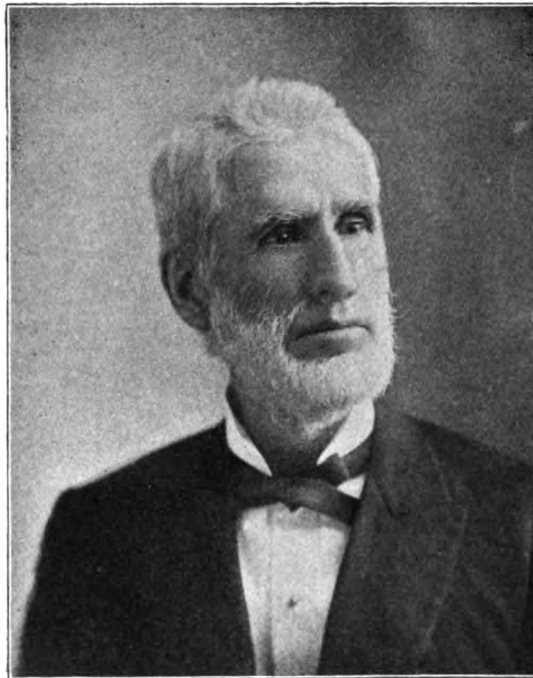
B. L. D. GUFFY.

Judge Bayless L. D. Guffy was born in Muhlenberg County, Kentucky, on December 24, 1832. His paternal grandfather was a soldier in the Revolutionary War and his father came from Pennsylvania to Kentucky in 1798. Thus Judge Guffy is more di-

rectly connected with the early settlement and history of the State than any of his associates on the bench.

In 1856 he was admitted to the bar and he at once located in Morgantown, Ky., where he resided almost continuously until his election as Judge of the Court of Appeals in November, 1894.

It has been said that soldiers and sailors have no politics but this principle cannot apply to jurists, because Judge Guffy has proved their ver-



B. L. D. GUFFY.

satility by various political alliances. He has yielded submission to no party or set of men. In 1894 he was the Republican candidate for Judge of the Court of Appeals and he defeated the Democratic candidate, Judge Willis L. Reeves, a distinguished Circuit Judge of southern Kentucky.

Judge Guffy took his seat on the bench in January, 1895, and since that time he has decided a vast number of cases, many of them of the greatest importance.

In the case of Ohio Valley Railway Co.,

etc., *v. Landers* (20 Ky. Law Reporter, 913), Judge Guffy wrote the opinion of the Court sustaining the constitutionality of the "Separate Coach Law," an act of the Kentucky Legislature requiring railroad companies to provide separate coaches of equal grade or class for white and colored races and prohibiting the one race from riding in the cars or compartments provided for the other.

In the case of *Pedigo v. Commonwealth* (19 Ky. Law Reporter, 1723), evidence had been introduced in the lower Court to prove that the appellant had been tracked by a bloodhound from the scene of a murder to the place where he was arrested. This character of testimony was objected to and the majority of the Court of Appeals held that such evidence was admissible (the jury to judge of the weight that should be given to it), when it could be shown that the bloodhound was of approved pedigree or purity of blood. Judge Guffy in a strong and elaborate dissent, that has attracted attention all over the country, objected most strenuously to a rule of law that would allow the life or the liberty of the citizen to be taken upon the testimony of a bloodhound, contrary to the rights of the accused to be confronted by the witnesses against him and to have an opportunity to cross-examine or to impeach them. His opinion is most readable as well as interesting and important. It may be remarked in passing that the case

was reversed on other grounds and that upon the second trial the prosecution (to quote Judge Guffy) could not "qualify the dog as a witness" by proper proof of breeding, so the matter was dropped in that case, but a dangerous rule received the sanction of the majority opinion.

Judge Guffy's labors in the Court have done much to clear the docket of the immense number of cases accumulated before it.



GEORGE DU RELLE.

GEORGE DU RELLE.

Hon. George Du Relle is the youngest and at the same time one of the most talented Judges on the Appellate Bench in Kentucky. He was born in Livingston County, N. Y., on October 18, 1852. His father was a distinguished physician who had been trained in the best eastern colleges. Judge Du Relle inherited from both his parents a mind of quick perception and strong grasp and a fund of humor that makes him one of the most compan-

ionable men in the State.

When he was quite young his father died and his mother married Prof. S. B. Barton, of Center College. In 1859 the family removed to Louisville where Judge Du Relle was brought up under the instruction of his stepfather. After a course of study in preparatory schools he entered Yale College in 1872. Upon leaving college he taught in the public schools of Louisville while preparing himself for the study of law. In 1874 he graduated from the Law Department of

the University of Louisville and at once commenced the practice.

He was made Assistant District Attorney of the United States for the District of Kentucky in 1882 and so well did he discharge the duties of the position, that in 1889 he was reappointed by President Harrison.

Judge Du Relle has always espoused the faith of the Republican party. In 1894, he was a candidate for the Republican nomination for Congress but was defeated by Hon. Walter Evans, at present United States District Judge for the District of Kentucky.

In 1895 he was made Republican candidate to fill a vacancy in the office of Judge of the Court of Appeals. He was elected in November of that year and soon after he took his seat on the bench.

Many important questions affecting taxation and municipal government have come before the Court since Judge Du Relle be-

came a member and he has brought to their consideration a clear, calm judgment that has compelled admiration and respect from the bar and from his associates even when he dissented from their conclusions.

The opinions written by him are valuable contributions to the jurisprudence of the country.

JAMES D. WHITE.

Hon. James Dempsey White was born in 1833 in Hickman County, Kentucky. His

father was a Baptist preacher, who removed to Kentucky from North Carolina about the year 1810. This sturdy stock insured in the son a firmness of purpose that, coupled with his vigor of intellect, made certain his success in life.

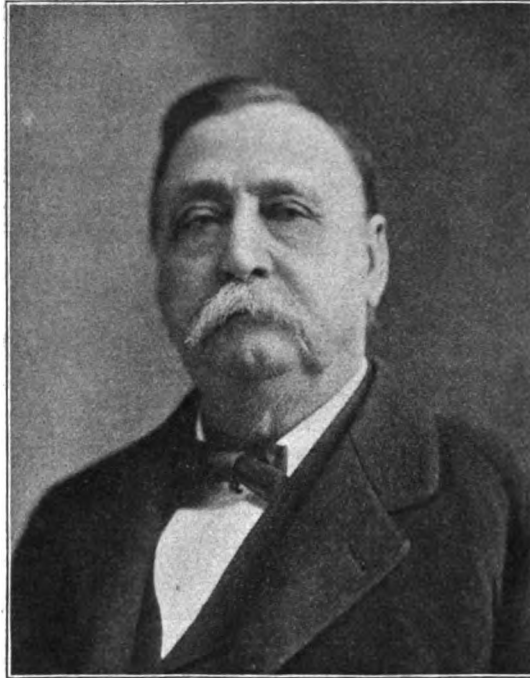
Judge White in his youth received a thorough course of training in the schools of his section, and having taken up the study of law he was, in 1853, admitted to practice.

His popularity and personal strength are attested by the fact that his people have repeatedly honored him with official position. In 1870 he was made Judge of the Common Pleas Court for his judicial district, and he continued to hold the office for nine years.

In November, 1896, he was elected by the Democrats Judge of the Court of Appeals to fill a vacancy caused by the death of Judge John R. Grace. His Republican opponent was Judge Joseph I. Landes,

who had temporarily filled the office by appointment of the Governor after Judge Grace's death.

On November 24, 1899, Judge White delivered the opinion of the Court in a most important case affecting the jurisdiction of a state court of Indiana to render judgment by default against a defendant who was served with process on the Ohio river, south of low water mark on the northern shore. It was claimed that the two States of Kentucky and Indiana had, under the compact



JAMES D. WHITE.

with Virginia made by the General Government in 1789, concurrent jurisdiction over the Ohio river.

Judge White holds that this concurrent jurisdiction is legislative, simply, i. e., for the purpose of regulating the use of the stream, or the erection of bridges, etc., and that as the low water mark on the north shore is the acknowledged boundary line between Kentucky and Indiana, the process of the Indiana Courts could not run into Kentucky territory. He therefore held in a suit upon an Indiana default judgment that the judgment was void for want of jurisdiction in the Indiana Court. His conclusions are supported by able reasoning and an extended discussion of authorities, and the opinion was concurred in by the whole Court.

The Attorney General of the State of Indiana, recognizing the importance of the case, has recently obtained leave to file a petition for rehearing in the case. At the present writing this petition has not been disposed of. The case will in all probability go to the Supreme Court of the United States, and its decision will be awaited with great interest.

A. R. BURNAM.

In November, 1896, Anthony Rollins Burnam was elected Judge of the Court of Appeals for a term of eight years, over the strongest candidate that could have opposed him, Chief Justice William S. Pryor, who

went before the people with the prestige of twenty-five years of honorable service on the bench.

An election under such circumstances is in itself a great tribute to any man, but the high character of Judge Burnam as a man and as a lawyer, and his honored family connection made him worthy of the confidence reposed in him by the people.

He was born in Richmond, Kentucky,

October 10, 1846.

His father, Hon. Curtis F. Burnam, is still living, one of the courtliest and most accomplished men in the entire country. The sterling qualities of the father have been transmitted to the son, who by his vigor of mind and integrity of purpose has taken high rank among the Judges of the State.

He was admitted to the bar in 1869, and soon became associated with his father in the practice. Their partnership continued until the son was

elevated to the bench. Before his election in 1896, he had never held judicial position, but he had been honored by his people in many ways, and in 1889, President Harrison had made him Collector of Internal Revenue for his district.

In all the relations of life, he has acquitted himself with credit and since taking his seat on the bench in January, 1897, he has added much to the reputation of the Court. His opinions are terse, pointed and logical.



A. R. BURNAM.

JOHN P. HOBSON.

When the last term of Chief Justice Lewis expired, John P. Hobson, of Elizabethtown, Ky., was one of four able and upright lawyers who contested for the Democratic nomination to succeed him. The Republicans also put forward a clear and able jurist in the person of Circuit Judge Wallace W. Jones, of Adair County. During the campaign, the people and especially the lawyers, of the State looked on with a feeling of satisfaction that is seldom felt either in political or in judicial contests. It was an assured fact that no matter what the fortunes of war or politics might be, the State of Kentucky would be served by a Judge of ability and integrity in its highest Court.

If this assurance could always exist, much of the danger or at least the anxiety incident to the election of Judges by popular vote would be dispelled.

Judge Hobson

came to the bench in January, 1899, under most favorable auspices. His work in the Court thus far has justified the predictions of his friends and the expectations of all.

In his private life, he is a devout Presbyterian, active in all the good works of his church. He was born on a farm in Powhatan County, Virginia, on September 3, 1850. His family is one of the best in the "Old Dominion." He was educated under Gen. Robert E. Lee at Washington College, of which Gen. Lee was the President (now

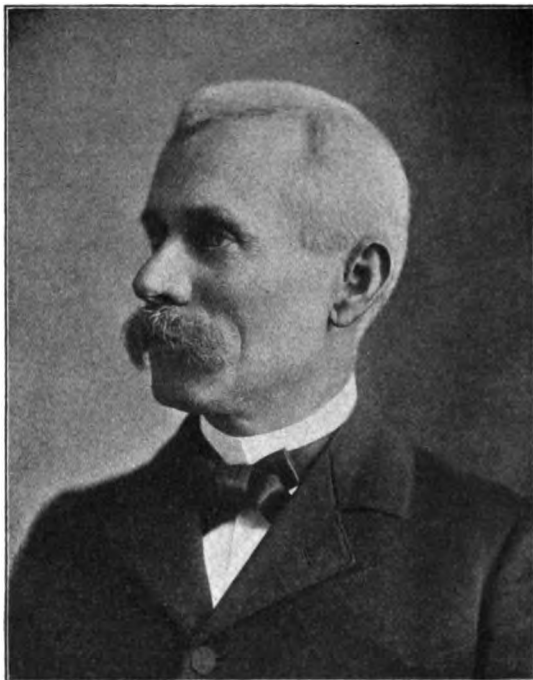
Washington and Lee University at Lexington, Virginia). In September, 1870, he came to Kentucky and for three years he taught school. He then took up the study of law at Elizabethtown under the instruction of the venerable Judge A. M. Brown. He was admitted to the bar in the summer of 1873 and until his elevation to the bench he enjoyed a large practice. Some of the most important cases that ever came up in his circuit were conducted by him. Only one, however, need be mentioned here—that of *Hardin County v. Louisville & Nashville Railroad Co.*—in which after a fiercely fought battle Judge Hobson finally recovered for his county a judgment in money and stock worth more than a quarter of a million of dollars.

As a lawyer he took high rank at a bar that has been famous from the foundation of the State.

As a judge he has shown a ready grasp of the many and

complicated questions coming up for solution and his diligent, studious nature gives promise of even greater achievements in the future.

In concluding this sketch, it is but due to the present Judges of the Court of Appeals to say that the period of their public service has been the most trying time in the history of the State. Political conditions for which the judiciary cannot be held responsible have brought Kentucky face to face with dangers that the Courts cannot avert. In



JOHN P. HOBSON.

the passions of the hour, the press and the public have sometimes indulged in criticism that the existing facts and the calm conclusions of history will not sustain.

Even the Supreme Court of the United States has not escaped censure under like circumstances.

In such a time, it is a matter of special

interest and pride to Kentuckians to review the history of a Court that from its organization has contained some of the ablest jurists of the land. The Court of Appeals of Kentucky has been the chief pride of a State that in all departments of government has given to the world some of its most distinguished statesmen.

THE LAW OF THE LAND.

XIII.

TORTS OF THE TONGUE.

BY WM. ARCH. McCLEAN.

DAILY man arises in the morning, goes to work and carelessly, thoughtlessly, accidentally and deliberately commits torts, and before the setting of the sun is within the jurisdiction of the law of the land for that which he hath done. It is one of the most difficult things for a man to reach his grave without either himself, or his man servant, or his maid servant, or his ox or his dog having committed a wrong for which he may be held to answer in the courts. It would seem as though mankind had entered into a conspiracy in the matter in order to give employment to the legal profession.

One may be the most peaceable of men, yet this very characteristic may be the cause of his keeping an unruly ox that should have been led to the slaughter while his flesh was palatable, and that ox possesses a well known habit of goring humanity or trespassing in other people's closes. Or he may have been harboring a worthless yellow dog, who insists upon affectionately biting people. Or he may have been rearing children who are without his taste for peacefulness, and who recklessly do wrongs to other inhabitants of the world. Or he may have been hiring servants

who in the discharge of their duties do the things they are told to do in ways their employer never conceived of so that wrongs are done for which the latter may be held to answer. The peaceable citizen accepts his fate as inevitable and at the end hands in his resignation without any mental reservation for a state where he may be free from answering for the torts of other people and beasts.

The reverse is quite as true that it is just as difficult to go through life without having some one else wrong you. Your own municipality may wrong you with the obstruction that is placed in your path for you to stumble over of a night, or by a pitfall that is dug for your feet, of which you are given no notice. Your neighbor's ox gores you and his dog sends you off for Pasteur's treatment. Others trespass upon your lands, your crops, your orchards and your hencoops. You are imprisoned without a cause, you are persecuted, your wife's affections are alienated and divers other innumerable torts are done unto you.

This condition may be due to the fact that there are so many of us on top of the earth

that one can scarcely stretch himself without hitting his neighbor. The law of the land however makes no allowance for such a state, rather, the more of us the more reason to so move about that you do not tread on each others toes.

This daily commission of torts is more likely due to the wilfulness of mankind. They possess wills to have their way regardless of the cost to others, which is a beneficent provision for the lawyers who were intended to encumber the earth.

If every inhabitant of the globe went about at the end of a string held in the hands of counselors of the law, philosophers or even omnipotence itself, whose duty it would be to give a jerk and a long haul when a tort was about to be committed by a party or upon him, it is doubtful even then if mankind could be restrained from the commission of his torts. He might be safe from physical torts, trespasses and wrongs, but the most unruly organ of his body would still be at large to go on its wilful way. Though man might be helpless in a literal sense to do a wrong with force and arms, yet as long as the tongue can wag and the brain conspire with it to say the things that should not be said, he would be able to commit a tort, do a wrong and injury to his neighbor. One of the bad habits of humanity is the torts of the tongue. The tongue is so balanced in many that it wobbles or swings on a pivot all the time, and with an equally balanced brain behind it, there are sure to be mental and legal breaches of the peace.

Recovery in damages can always be had for torts or slanders of the tongue, provided one can prove that one suffered an actual resulting injury. This is a very difficult thing to do in a great many instances. If a slanderous remark caused one to lose employment or business, the proof of the resulting injury is a simple matter. But the injury done by slander in so many instances is a mental one. People's heads and hearts

cannot be opened and exhibited to juries so that they may see the effect of a slander. Hence by far the greater number of slanders are without a remedy because of inability to prove a resulting injury. There may be an injury somewhere in the common mind of the community but it is not a subject-matter of proof.

There are however slanders and slanders. Slanders that require proof of resulting injury, and slanders that do not require any such proof. Slanders insinuating and suggestive, without a remedy, and slanders that are slanders to merely utter them. The one is the stab in the back, the other is the blow in the face. When one is about to slander another there is a fair square way to do it, openly and above board, prepared to take the punishment the law of the land will give you. The slander without a remedy is for despicable cowards.

Slanders that are slanders in the mere utterance of them are those in which their injurious character is a fact of common notoriety, established by the common consent of men, and courts consequently take judicial notice of them. The utterance of them necessarily imports damages, and, therefore, resulting injuries and actual damages done do not have to be proven. The proof of the slander is the proof of the damage, and it is for the jury to estimate the same in the coin of the realm.

Torts of the tongue which have been adjudged slanders in themselves, actionable *per se*, are words falsely spoken of a person which impute to the party some criminal offense, involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. To call a man a thief at once injures him in the estimation of his neighbors and places him in a position where, if the slander is true, he could be arrested, indicted, and deprived of his liberty, bringing upon him irreparable loss and damage.

A slander *per se* is not without its distinc-

tions and may be said to have comparative and superlative points of view. That is, to say of a man that he is a thief is more of a slander at one time than another. To so speak of an honest man means more loss, damage and disgrace, than of a dishonest one. Again, he who gives utterance to such a slander may be a disreputable sort of a character or it may come from the most exemplary citizen of the community, and the latter will be so to speak more slanderous than the former, because the tort of the tongue of the man of good repute must necessarily be more damaging than that out of the mouth of the man of no account.

Words falsely spoken of a person which impute that the party is afflicted with some contagious disease, when if the charge is true it would exclude the party from society, are slanderous in themselves, and proof of the words is the proof of the damages which the jury is to estimate. Human society draws peculiar distinctions. It tolerates moral leprosy, but let it be said of any one that he or she is a physical leper, the doom of such a one is sealed, doors are shut in their face. They are shunned. There is no place for them except Molokai. So where one is so falsely slandered, the words are actionable in themselves.

Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit or the want of integrity in the discharge of the duties of such an office or employment. To say of a magistrate that his decisions are not honest, that he is a blackleg who, without regard to law or justice, pulls the legs of those who come before him, must necessarily injure an officer and hence the proof of the words is proof of the damage.

Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade are slanders *per se*. Your butcher may have sold you a great many pounds of bone which lie more heav-

ily on your conscience than his, but it will be no justification for you to give vent to your feelings by saying that he keeps false weights and that he keeps false books, and that he makes more money in that way than by the meat that actually goes over his counter. Such words will do him injury in the utterance of the same and hence are slanderous, and no proof of damage is required by the law. Should you attempt to prove the truth of what you said, you will fail, for the butcher will prove beyond the shadow of a doubt that all his legitimate profits are in the bones.

There are slanders where the words falsely spoken of a person, though not generally actionable in themselves, become so in particular localities by common consent and are deemed so exceptionably disgraceful and damaging that courts will take judicial notice of their injurious nature. To be falsely called a witch in ye olden days in Salem would be a slander *per se*. In these modern days many of us laugh at such things, but there are communities standing just beyond the trend that hint of such things, and to be called a witch in such a community might be so exceptionably disgraceful and damaging that a court would take notice of the same.

Many of those who deal in slanders are cowards and think to escape the consequences of their speech by couching it in terms containing no positive affirmation. They argue that when they say I think or I believe that it does not necessarily mean that the party spoken of did the act thought of or believed about. Courts, however, can not be hoodwinked with any such special reasoning. They have declared that a slander, clothed in an expression of opinion or belief, might destroy the fairest reputation with impunity and that the law will not countenance such an artifice. So it may be said that he who steals my pocketbook steals trash, yet if I say of him that I had reason to believe he stole it, or I am persuaded in

my conscience he stole it, or I am thoroughly convinced he stole it, or I think he stole it, or I dreamed he stole it, or for aught I know he stole it, it will amount to the same thing as though I had said he stole my pocketbook and is a thief. It won't help my case either if I make positive proof that my pocketbook was only trash.

As the world seems to have plenty of people upon it who are possessed of a habit of speaking ill of their neighbors, it might at first blush be supposed that such would be continually running foul of a slander for which he or she would have to answer in damages. Such is not the case, however, for two reasons. First, a large majority of those who possess this characteristic do not have this world's goods in abundance, so that after a recovery of damages there would come a default in the collection. In consequence the injured one considers the source, and as there is no other remedy turns the other cheek. All of us generally do turn the other cheek when there is nothing else left to be done. Second, language is elastic enough to furnish many expressions which will answer the purposes of those slanderously inclined without any risk of being called upon to answer for the same.

For instance so long as you do not speak of one swearing falsely in court, thus practically charging him with perjury, you may generally and repeatedly say of any one you have a mind to say it of that he is a liar, or that he is sixteen liars. You may be knocked down for having said it, but it is no slander if you spoke in general terms. So likewise you can call the man you pick a quarrel with a cheat, or a rascal, or swindler, or a blackleg or many other opprobrious names, yet if such terms are not spoken of him in reference to any official character he may bear or in reference to his business, no action lies for such words. If you call your victim a rascal and say it with a meaning look, and add that you could tell something, if you wanted to, and shake your head or

wink your eye darkly, your slander is not a legal one, within the jurisdiction of the law of the land.

Courts are continually drawing distinctions in the matter of slander. Where they are in doubt as to the meaning of the words, all they have to do is to turn to the jury kept on tap beside them to advise the court of the fact of the intention with which the words were uttered and the meaning sought to be conveyed. Where one said, "I think the present business ought to have the most rigid inquiry for he murdered his first wife, that is, he administered improperly medicine to her for a certain complaint, which was the cause of her death," it was said that it does not follow because one person caused the death of another that to give utterance to that fact will be a slander *per se*. The death might have been caused in some way in which the party would not be held criminally for in any court, so words to be actionable *per se* must be used in their usual sense to import a charge of murder or manslaughter. The court submitted to the jury the meaning of the above words. The jury were of the opinion that they were uttered with the intention to cause it to be believed that the plaintiff was guilty of murder or manslaughter, hence the words were slanderous. In two other cases the words were: "In my opinion the bitters that D. fixed for S. were the cause of his death" and "Old lady you gave my father four double doses of morphine on the day he made his will, you said, 'Old man you had better be fixing up your business.' If it hadn't been for your giving the morphine your daughters would not have gotten what they did," were held not to be actionable in themselves; the words did not import a charge of murder or manslaughter, or any crime for which the party could be indicted or punished.

It is no slander to say that A had stolen growing corn, or that A stole windows from B's house. The words were not actionable in either case. Only a trespass was commit-

ted by taking the corn and only an act of malicious trespass is imputed in the taking of the windows and neither were criminal offenses involving moral turpitude for which the party may be indicted and punished. Never accuse one of stealing your pocket book. If you happen to be in a slanderous mood drop a hint that A is mean enough to steal windows and you will be safe from answering for your words. Such words besides are not likely to involve proof of special damage, unless it were that he would be criticised to his prejudice in overlooking taking the house with him when he was smart enough to steal the windows. Along the same line the words, "You have stolen hoop poles and saw logs from D's land" was not actionable, only a trespass being imputed.

It would appear from the authorities that you can call a physician such a variety of pet names as you may see fit with impunity. You may call him "a quack" or a "two-penny bleeder," and the words are not actionable. He is so accustomed to being called names when he does not cure or when he refused to deceive the hypochondriacs with bread pills, that the law has doubtless come to the conclusion that it does not do him any harm, that some time or other all of us have to go to the doctor, no matter what some one else has said about him, hence his business generally speaking cannot be injured.

Of all actions the rarest is one by a lawyer for a slander circulated about him. It is just possible that attorneys grow so accustomed to being slandered by each other during the progress of trials and at the end thereof shaking hands as though it had all been a huge joke, that they never know when they have been slandered in dead earnest. On such an occasion it is just the same old joke in a new form and rolls off like water off a duck's back. But when a lawyer puts on a little official dignity, look out. He will not stand the trifling he did when he was an ordinary squabbling attorney. To say that you don't want to sit as a juror before such a

damned fool of a justice may express your own feelings, but it has been held that such language is slanderous *per se* and would besides be in contempt of court. Again, the words were held to be actionable in themselves to say of a judge that "he is a damned old rascal and has done that which will remove him from his seat." When you have lost your case and are angry at the court in consequence it would be just as well for you that you do not say anything, for courts have tender solitudes for the respect due them. Think it all out logically and concisely before you give expression thereto, and then don't say it at all.

A curious slander case is one in which it was said of a candidate for Congress that "his mind was weak," and these words were held actionable in themselves as necessarily injurious to one seeking an election to such an office of public trust. To say the least, that was an exceedingly patriotic decision. Would it not be lots of fun to defend a few slanderers uttering similar language against some few nameless M. C.'s and by way of defense plead justification and prove the truth of the spoken words?

There is one profession one must speak of with care and respect. You might with impunity call your lawyer or your doctor a drunkard, and those who listened to such language would, for some reason or other, think very little about it and the courts would say neither were injured by the words in themselves. If, however, you say of your pastor that he is a drunkard the words will be actionable in themselves. Such an accusation would in itself damage a preacher, injure him in character and in his business, to his great prejudice and probable loss of a charge. Where it was said of a minister that "he stayed at our house last night and was pretty devilish drunk; he made out to stagger up to the house. He was so drunk he could not find his key," the words were held to be actionable in themselves. This is not surprising, for a minister to be so intox-

icated as not to be able to find his key would be disgraceful. It might not have been so bad if he had only lost the keyhole, but to lose both the key and keyhole would be such a paralyzing drunk as would be both scandalous and slanderous to speak of if false.

An interesting case grew out of an alleged slander in which the defamatory words were that "boots had been stolen from a dead body washed ashore from a wreck." If the boots had been washed ashore they would have been derelict and belong to the finder. But it was not the boots that were washed ashore, it was their dead owner who was beyond disputing their ownership. The court reasoned the matter not that the boots were not derelict and had not been voluntarily abandoned by the owner. It was true that he was washed ashore, but he brought his boots along, and being attached to the body they were his property at the time of his decease. Hence to steal boots being the property of another, even though that other was a dead body washed ashore, was to impute a felony and the words were actionable *per se*.

Words not actionable in themselves become so when spoken of a person in his trade or profession. To say of a weaver, "he pawneth the goods of his customers and is not to be trusted," of a maltster, "he is a cheating knave and keeps a false book," of a blacksmith "he keeps false books and I can prove it," of a drover who purchases cattle and drives them to market, that "he is bankrupt and is not able to pay his just debts," have all been held actionable in themselves without proof of special damage.

It is possible to slander a man not by charging that he committed a criminal offense for which he may be indicted and punished, but that he has already been punished for such offense. Hence words charging one falsely with having been a convict in the penitentiary of a sister state are actionable *per se*.

It was adjudged in another case that words falsely spoken of a person imputing a crimi-

nal offense, for which the party if the charge is true may be indicted and punished are actionable in themselves even though the proof is complete that the offense could never have happened. Words, "you have killed A. B., you have poisoned him and I can prove it," were actionable even though A. B. was never poisoned, even though he was alive as he could be, in a distant part of the country. A nice illustration, by the way, that false words must be the foundation of a slander. It makes no difference what the facts are in connection with the subject spoken of, provided the words be false.

Some people use the most extravagant language about nothing and exhaust themselves and their tempers in Billingsgate, but not every one that so murders the Queen's English will be adjudged a slander *per se* in the eyes of the law. In one case when it was said of J. K., "He is a damned rascal as ever lived, and all who joined his party in the procession on the Fourth of July are a set of black hearted highwaymen, robbers and murderers," it was shown that these words were used about a fuss over a bass viol in which a man had been stabbed and they were held not to be actionable. It was only one of those awful fusses that are indigenous to choirs.

It would be well for one about to slander, to stop, think, consider. Then if you must commit the tort, there is no escape from it, go into a corner with yourself and commit the tort upon the empty air. Do not permit any one to hear the slander you utter but yourself. Then you can have all the satisfaction of having spoken a slander but will not run the legal risk of having to answer in damages for the same. Is it possible for a slander to give any other satisfaction to the one uttering the same than that of having heard oneself talk? To make a slander technically legal, depends upon the audience. If it is to yourself, no publication results. If to another, there is a publication, for the essence of the tort is starting it on its circu-

lation through the world from mouth to mouth. If you slander a fellow in your mind and never let it come out by way of the mouth, it is all right legally, but if you cannot control the tongue, it is all wrong.

The question asks itself. Suppose you are the one to whom the publication is made, can you run and tell your next neighbor all about it, swap it for something the neighbor has to tell. If you repeat the words, adopting them as your own you will be slandering as much as the one you received it from and may be held to answer in damages. One court, however, has held that he who hears a slander may repeat it, if he does so in the same words and gives his authority at the same time. For instance, you may say that John Smith said yesterday in my presence, in front of Jim Brown's store, that Bill Jones was a thief, I don't know anything about it myself, I'm only saying what John Smith said.

There is always one way to escape answering for your slander, and that is by proving what you said was true when action is brought against you. Plead justification. Beard the lion in his den. Take the bull by the horns. It is a bold game. The burden will be upon you of proving the truth and you will have to make the proof so clear

that if the man was being criminally tried upon the charge he would be convicted. If you slip up in your proof in any way your failure will probably cost you more money in the damages the jury will give against you by reason of your slander. If, on the other hand you win, the thief will be a thief and it will not be any tort of the tongue to have published the fact that a thief's a thief.

It is very much feared that if the tongue had its way — full sway — we would come to be a nation of banderlogs. Queer, very queer it is that as we approach a condition of deaf muteness we grow in wisdom. By the way, while talking about deaf mutes, no case can be found where a court has yet tackled the question of the tort or slander of a deaf mute and its publication. That will likely furnish some interesting points, for instance the deaf mute may have gone into a community to commit his tort where no one quite understood the rapid sign manual of his hands. Or suppose the alleged tort would consist in gestures, going up to one and angrily shaking his fist in the other's face, and slapping his pocket from whence the missing article departed. What will the decision be? We commend it to the judge who shall solve it.



WHIMSICALITIES OF IRISH WITNESSES.

BY JOHN DE MORGAN.

A WITNESS in our Courts seats himself comfortably, crosses his legs, makes himself at home and in some instances leans over and tries to chat confidentially with the Judge. In England the witness stands in a box, like an old-fashioned pulpit, the prisoner occupying a little larger box, while in Ireland the witness stands literally on a table in front, and beneath the Bench. He is denied the privilege of leaning on the front of the box, like his English brother, but has to stand, often feeling most uncomfortable, making an exhibition of himself for the amusement of the people in the Court. Sometimes the Court is indulgent and allows him to be seated, but that is so rare, at least in the days when I frequented Irish Courts, that when granted, the witness was sure to be looked upon with suspicion as being too friendly with the Court.

The Irish witness, especially when belonging to the peasant class, is often a trial to the counsel, for not only is he quick at repartee but his answers are often confusing by their quaintness and whimsicality.

In the Bankruptcy Court I once heard a witness asked the amount of his gross income.

"Me gross income is it, sure an' I'd have ye know that I've no gross income, I'm a fisherman an' me income is all net," was the astonishing reply.

These witnesses are often confused through the misunderstanding of words and phrases and as a consequence many a laugh cannot be suppressed, even by the most strict tipstaff.

"He called me out of me name," said a witness in a case of assault by a man on a woman. The Justice, trying to preserve the relevancy of the witness's testimony, said:

"That's a civil action, my good woman."

The witness's eyes flashed fire as she looked up at the Justice.

"Musha, thin, if ye call that a civil action, it's a bad bla'gard ye must be yerself."

I once heard a clerk ask a witness to take the Bible in his right hand. The witness replied that he would not do so, and continued to hold out his left. Then the Court thundered out:

"Take the book in your right hand, sir."

"Begorra if ye say so, I'll do it, but I'm not responsible for what I do."

"What do you mean?"

"Musha, it's left-handed I am, an' me right can't be depended on at all, at all."

The witness evidently thought that his physical incapacity would affect the value of his testimony, if he used the right hand for holding the book.

In a case of assault on a wife by her husband, the counsel for the complainant, after she had been sworn, asked most insinuatingly, and with a look at the Justice which was intended to create sympathy:

"And now, Mrs. O'Sullivan, will you kindly tell the Court whether your husband was in the habit of striking you with impunity?"

The counsel looked again at the Justice while awaiting the reply.

"With what, sor?"

"With impunity!"

"Faix he did, sor, now and thin, but he sthruck me more often with his fisht."

The counsel was compelled to smile, but he was equal to the occasion, for he immediately asked:

"And that hurt you more?"

"Indade it did, sor," was the reply.

When the great O'Connell roused the ire of a fishwife by calling her a "parallelogram," the world laughed, but only a few

months ago a woman asked for a warrant against a man for using abusive language in the street. "What did he say?" asked the magistrate. "He wint forenst the whole world at the corner of Capel street, an' called me, yis he did, yer wuship, 'an ould encommunicated gasometer.'"

In a trial at the Galway Assizes, a witness, one Patrick Flanagan, was a great friend of the accused and gave his evidence very reluctantly. He was thick in his utterances and added to his obvious dislike to testifying, he labored under the physical difficulty of having lost several of his front teeth in a recent fight. Several times he was asked to repeat his answers, and he got excited. Then the use of long words by the counsel added to his nervousness, and he answered very incoherently. "Don't prevaricate, sir," shouted the Judge angrily. "Prewaricate, is it!" exclaimed the witness, "I'm thinkin', me lord, it's yerself wouldn't be able to help prewaricatin' if three or four of yer lordship's teeth wor knocked out of yer head!"

"Not guilty, me lord, but the jury advises the prisoner not to do it again," was the verdict in a case tried in Tipperary, and this has its counterpart in the verdict of a Galway jury, "My lord, we find the man who stole the horse not guilty."

"How can you swear that the hens found in this man's yard belonged to you?" asked a lawyer of a witness who appeared against an alleged chicken thief in Waterford. "By the kind, sor." "Why, that is absurd, I have some like them myself." Quick as a flash of lightning the witness replied, "Very likely, sor, I lost some a bit afore this man took thim this toime."

In a northern Court an old woman was exceedingly garrulous, and insisted in telling the Court what she would do if she were on the bench. The Judge at last exclaimed, "An old woman is not fit for the bench." "Sure, your lordship ought to know from experience," was the retort which convulsed

the Bar, for the Judge in question had earned the soubriquet of "old woman."

In Ireland the peasantry still use the word, "killed" in its original sense, conveying the idea of serious injury, rather than death. Thus the frequenters of Irish Courts will often hear a witness swear in assault cases that he was "kilt entoirely." An amusing instance in which the word was used in that sense appears in a report of a case recently tried in Sligo. An old man, who had been assaulted, was being examined by a young and inexperienced barrister, who was conducting the prosecution. "And were you stunned when you were knocked down?" he asked. "Was I what, yer honor?" asked the witness. "Stunned," repeated the barrister. "Shure, I don't know what yez mane, sor." "Were you rendered insensible?" Shure, what's insensible at all, at all?" the witness asked, his face showing clearly that he was perplexed. "I'm afraid I cannot get any good out of this stupid witness, my lord," said the counsel. "Let me try him," said the Judge. "Come, my good man, did they kill you now?" The face of the witness brightened up and he exclaimed, "Faix, that they did entoirely, me lord."

In a Petty Sessions Court a man was sued for the non-payment of his rent. In his defence he maintained that the place was so small that it was not worth the rent demanded. "Why, yer honner," he exclaimed, "the room is so small that a donkey couldn't turn around in it; just come and try it, yer honner."

The witnesses have no intention of being disrespectful, but their simplicity, shrewdness and brightness mingle together and cause the whimsicalities to which I have referred.

I was making a pedestrian tour of Ireland in the later days of the Fenian movement, and many curious incidents came under my observation, showing how zealous the Royal Irish Constabulary was in arresting strangers

and charging them secretly with Fenianism. At that time the Habeas Corpus Act was repealed and any one arrested could be kept in prison, without trial, for a period of two years. When a man was tried he felt that he was to face a partisan Judge and a packed jury. I am not going to make the charge that juries were always wilfully packed, but I know that many a jury was afraid to give an accused the benefit of any doubt, because the liberty of each member of that jury was imperilled.

I remember reading of one instance where the accused was so well pleased with the personnel of the jury that he did not challenge any one, but when his counsel whispered that it was strange, he replied, "The jury's all right, but I'd loike to challenge the Judge."

The witnesses were also afraid to testify too strongly in favor of the defendant, for if they did, they might be treated as I heard a witness treated in Cork. Judge Keogh, who had been a Nationalist at one time, but was accused of betraying his fellow Nationalists, listened to a witness who told a very straightforward story, and then advised the Chief of Police to look into the character of the witness, as it was likely he was a Fenian. Of course the witness was arrested.

There is a very good story being retold, but which is actually a true story of those days. A Judge was trying a case where the accused could only understand the Celtic language, and so an interpreter had to be employed. The official interpreter was a good fellow, whose wish was to do justice, but he certainly had leanings towards the defendant.

The accused man was holding a long conversation with the interpreter, and that worthy did not translate the speech to the Court. At last the Judge demanded to know what had been said.

"Nothing, my lord," was the interpreter's unblushing reply.

"How dare you say that when we all heard you talking to him. Come, sir, what was it?"

"My lord, it had nothing to do with the case."

"If you do not tell me what he said I'll commit you for contempt. Now what did he say?"

"Well, my lord, you'll excuse me, but he said, 'Who's that ould woman with the red bed curtains round her sitting up there?'"

Everyone in Court laughed, and the tip-staff did not, for a moment, try to stop the unseemly conduct. The Judge, in his red robes and white wig, colored until his face was brighter than his red robes and asked:

"And what did you say?"

"I said, 'Whisht, ye spalpeen! That's the ould boy that's goin' to hang yez.'"

When a famous Fenian was being tried, he was browbeaten by the Judge until he could stand it no longer, and made retort in epigrammatic language:

"My lord, you can insult me as much as you please, it is for that you are there; but I am charged with the offense of being an Irishman who loves his country, and a renegade's insults flow from my character like water from a duck's back." The Judge was the notorious William Keogh, the friend of Sadlier, and a renegade Nationalist.



THE MANUSCRIPTS OF THE "YEAR BOOKS" AND THE CORRESPONDING RECORDS.

BY LUKE OWEN PIKE.

WHEN asked to give some account of the manuscripts of those old Law Reports which are commonly known as "Year Books," one feels that one can hardly succeed in making the subject intelligible unless one can transport one's readers in imagination into that age in which the manuscripts were used. The earliest of them now known to be in existence is of the reign of Edward I., though we know from Fitzherbert's Abridgement that there were some reports of the reign of Henry III. The language of them is French, and that was the language actually spoken in the courts until the thirty-sixth year of the reign of Edward III.

A very clear distinction must be drawn between the reports of cases earlier than the last mentioned date and the reports of the later cases. The former may be, if they are not always, a more or less accurate representation of the words actually used in pleading and arguing; the latter cannot, at most, be anything but translations from English into French.

The French of the one period is a living language, a branch of the *Langue d'Oïl*, illustrating and illustrated by other branches of the same family. The French of the other period is a professional language, such as the lawyers pleased to make it for their own purposes. It is this latter day Law-French which has been the subject of many gibes and jokes, and which has caused many laymen, if not lawyers also, to regard all Law-French as a mere jargon.

Down to the early part of the reign of Henry VIII., in whose time the series of Year Books come to an end, Judges and Counsel must apparently have had to rely upon manuscripts for a portion at least of

their case law, though some of the reports were printed a little earlier. Copies in earlier times were multiplied by hand only, and experience very clearly shows that these copies were not usually examined after they were made. Sometimes the scribe inadvertently repeats a passage; more often his eye deceives him, and he omits a passage beginning or ending with the same word as the passage which he had written just before. He is, of course, liable to err in other ways, like all other human beings, and the consequence is that any one manuscript of a report is usually more or less defective, even though it may be approximately contemporary. Sometimes one sees that the possessor of a manuscript has noticed a mistake and corrected it, either by conjecture, or by the aid of some other manuscript. As a rule it is possible for a modern editor to obtain a fairly satisfactory text by careful collation of a number of manuscripts, though it sometimes happens that in the last resort it is absolutely necessary to correct it by the record, and the record almost always furnishes information not to be found in the report.

Sometimes the manuscripts differ to the extent of substituting an affirmative for a negative, or *vice versa*, and when such a discrepancy occurs in the judgment, the roll settles the question beyond all possibility of dispute.

It must not, however, be supposed that there was always one single authorized report from which all copies were made. A case may sometimes be found reported in two or even three different forms. These independent reports could not all have been made officially, and there is no reason to suppose that one was so made rather than another. The lawyers consequently had to

contend not only with the defects in any copy which any one of them might possess, but also against the possibility that there might be produced some version of a case with which he could not be acquainted.

There appears to be an illustration of these difficulties in Trinity Term 12 Edward III. (p. 613 Rolls Series). A case having been only partly heard on a particular day, counsel opened his argument on the day following by citing a case in support of a particular point. According to Mr. Horwood's translation the Court said unanimously: "Your statement is false." The original French is: "Vostre livre est faux." There may, perhaps, be some warrant for saying that "livre" may in some cases be used for deliverance, or mode of expression, but this seems to be a very forced rendering in the present instance, and it unnecessarily attributes to the Judges an act of great discourtesy.

It is one thing to tell a man that his statement is false, and quite another thing to tell him that his book is wrong. There can be but little doubt that the lawyer had taken advantage of an adjournment to look out a precedent, which he found in his "*livre*" or book (the usual meaning of the word "*livre*") and that the Court, being better informed, would have none of it.

It was known even to the printers, publishers, or editors of some of the old black letter editions of the Year Books that reports occurred in more forms than one, though they did not always make the best use of the knowledge. Thus in the 17th year of the reign of Edward III. there are double reports of cases, and in many instances the second report is dissociated from the first, and either made to appear as a report of a different case, or else labelled as a "*residuum*" or continuation. The contents of one manuscript of a particular term having apparently been exhausted, the contents of another manuscript relating to the same matters but differing in form were tacked on

at the end as mere additions. This occurs even in the earliest known edition of the reports of the year, the publication of which is attributed to Rastell. For the 24th year of the same reign, however, we find Berthelot, or the editor for whom he printed, making additions to the previous edition or editions, with a distinct statement that he was printing different reports of cases already known, and this in very quaint English:

'Al be hit that a Reporte of this yere xxiiij Edwardi iij here after folowyng is al redy imprinted, and is more at lengthe reported than this is: yet it is thought that hit shulde not be unprofitable for the gentyl men studentes of the lawe to have this. For thoughe the other be the longer, yet for the most part through out the very groundes of the cases are more quickly and more clerely touched in this than in that as to the reders shal playnely appere.

Tothill republished years 23 and 24 Edward III., and substituted for the above passage in English the words:

Here folowe the shorte reportes of 24 of E. 3, whereunto are annexed the cases whiche were wanting in this and are in the long reporte, with such cases as are therein, more at large or easier reported there than in this: whiche you may finde in the ende of thys yere by the referments which are at the end of every such case double reported.

This last formula was copied into the edition of 1619, but not without mistake, for "E. 3." there became "E. 4."

The editors of the edition of 1679 took upon themselves to translate all this into French. They did not go back to an earlier edition but accepted that of 1619 for their model and copied the mistake which had then crept in. Their French is as follows:

Icy s'ensuivent les briefs Rapports de l' 24 du Edward le 4 aux queux son annexes les Cases qui furent marques en cet, et sont en le long Rapport, avec tels cases queux sont en cela plus largement ou plus facilement rapportes la, que ne sont en cecy: les queux on trouve a la fin de cet an par les references qui sont a la fin de chacun tel case doublement rapportes.

The word "marques" is clearly a misprint for "*manques*," but the whole sentence would be unintelligible, if there were no earlier editions to which reference could be made. Without them, indeed, it might be supposed that the whole announcement dated not from the year 1679 but from the year 1350. One thus sees how difficulties are imported into the printed editions which have no existence in the original manuscripts.

In the different manuscript reports of the same case, however, one sometimes finds not only that the same point is differently put, but also that the general outcome of the whole is not quite the same. After a decision, too, on some particular point, there not unfrequently appears some expression of doubt in a contemporary hand, which is to all appearance a part of the report.

A question, for example, having arisen whether a wife could be her husband's attorney, the Court said that she could, but the reporter, or some one writing very soon after him, nevertheless added the word *Quere*. Sometimes the reporter travels a little out of his way to inquire what would have happened if the facts had been slightly different, or if the pleadings had been in a different form, and sometimes he supplies his own answer in the words "*jeo crey qe*," etc., "I think that," etc., as the case may be. No Year Books or copies of them have been found among the records of any of the Courts. Some of the manuscripts are still in private hands; and those which are in public libraries can usually be traced to a particular donor or vendor.

From these and other facts it may be inferred that the Year Books owed their existence to private enterprise rather than to public authority. That there was a considerable demand for them there can be no doubt, as the Judges must have had them, and the Countors and the Apprentices of the Law must have depended largely upon them for the legal education of the day. The imperfections in the manuscripts were probably of

less importance than they are now, because the number of copies in existence must have been much greater, they must have been much more readily accessible to the profession, and the continual use of them must have rendered many obvious corrections a matter of comparative ease. The worst of them, it must be remembered, were not as bad as the best of the printed black letter editions of the Year Books, and they are not very often found wanting in those main features which were of vital importance to the lawyer.

His chief object was to know how to conduct every kind of case, what pleadings would be useful to him at each particular stage, how he could advance towards the goal which he had in view, and, by no means least of all, how he could delay his adversary. All this he might learn fairly well even from an ill-copied manuscript, when he could supplement his reading by listening to similar proceedings in Court.

To an untrained modern eye, however, the manuscripts present difficulties, which, at first sight, seem almost insuperable. The letter *c* can rarely be distinguished from the letter *t*. The letter *n* is commonly indistinguishable from the letter *u* (which may be equivalent to *v*) and the letter *m* from the letters *ni* or *in*. Long words may thus sometimes be read in quite different ways even when written at full length; *miniére*, for instance, might be read *numere* and *vice versa*. The most common words, however, are not usually written at full length, and the correct extension of the abbreviations must in many cases depend upon the context and upon a knowledge of the law and practice of the period. "*Def*," for instance, may mean *defaut* or *defendant* or *defendants*; "*t*" may mean *tenant* or *tenants*, or *tenements*. In these instances, of course, the context usually supplies the meaning without the necessity for much consideration. It is far otherwise with some other contractions. The letter *r* is, perhaps, the most troublesome of all the single letters, and it is not free

from ambiguity even when it has the letter *u* written above it. Counsel will sometimes argue at great length that his adversary ought not to be *r u*. This may mean, according to circumstances, either *resceu* or *respondu*, either admitted, or answered, either on the one hand that the party or pleader ought not to be admitted or allowed to bring a particular action, or plead in a particular way, or on the other hand that what he has said does not, in law, require an answer. The Court not uncommonly settles the matter shortly and sharply thus "R." or sometimes "Rz.," that is to say "*Response*": Answer; or the reporter says "*il fut mys par ag.* (which means '*agarde*') *a r. (respondre)*." When, however, the Court awards ("*agarde*") or adjudges that one of the parties shall "*r*" it does not by any means necessarily follow that this must mean that he is to answer. The expression may occur at the end of a case thus: "*fut ag [arde] qe le pleintif r. vers le def.*" and then the meaning is: "It was adjudged that the plaintiff should recover (*recovereit*) against the defendant." Even when the writing of the MSS. is a little more extended there are other pitfalls for the unwary. *Rndre* may equally mean *rendre* or *respondre*; *rec.* may mean *recorde* or *recoverir*, or any tense, mood, or person of the verb *recoverir* or *recoverer*; *res.* may mean either *resoun* (reason) or *resomons* (re-summons).

If it be asked how, in the midst of such confusion, it is possible to attain precision, or anything like certainty that the right extension can be given, there is, it may be hoped, a satisfactory answer to the question. When several MSS. are collated, it is found that one will occasionally supply the full word where another gives only a letter. In this way all the possible extensions gradually become known to the student. The application of the knowledge must of course depend upon his familiarity with the practice of the Courts, and, so to speak with their tone; but this comes with long experience, and, in the end, the words seem to evolve themselves out of

the symbols for them almost mechanically, and to take their different forms as naturally as different flowers or leaves developing out of similar buds. In this way one comes to understand how it was that, although there were positive misstatements of fact or law in some of the old MSS., to which their contemporaries showed that they were quite alive, yet, in the main, the reports presented fewer difficulties to the Judges and Counsel than might be supposed at first sight. The ordinary clerical errors would cause but little trouble. In case of doubt, too, the practitioners of the day could always fall back upon the rolls as we can at the present time, and there are instances in which the reports are absolutely unintelligible without the aid of the records.

Before explaining further, however, what use is to be made of the records, it may be well to mention one or two other points in connection with the manuscripts of Year Books which may possess some interest from a modern point of view. There is always a separate heading for each term, which, however, usually shows nothing more than the term and the regnal year. There are no headlines to the individual cases, which follow one another without any intervening space, though each case usually (but not quite always) begins on a new line. At the beginning of each case there is usually in the margin a note to show the nature of the action, e. g. *Quare impedit*, *Forme de doun*, *Cessavit*, *Acompte*, &c. The majority of the MSS. have no other side notes, except an occasional reference to an earlier or later folio on which an incomplete report may commence to be continued, and an occasional remark made by an owner of the book at some more recent period. To this rule, however, there are exceptions, as there is in some of the MSS. a longer or shorter abstract, in a contemporary hand, of the matters decided.

Though copies made generations afterwards may also be in existence, it is usually possible to find MSS. of the Year Books

written in a hand which is approximately contemporary. It is of course impossible to say, from the handwriting alone, that a MS. was written in any particular year, hardly possible to say with certainty that it was written in any particular reign, even though the reign may have been long. It is, however, quite possible to fix the date of a MS. within about half a century, or within the period during which any long-lived scribe may have been employed. He would naturally write in his own way, from the time of his first employment until his employment ceased, though the general character of writing might have undergone a change in the mean time. Broadly speaking, no expert would be likely to mistake the writing of the beginning of the reign of Henry II. for that of the beginning the reign of Henry III., that of the reign of John for that of the reign of Edward I., or that of the early part of the reign of Edward III. for that of the reign of Henry IV. The characteristics of the writing (including not only the forms of the letters, but also the ink used) could not be explained in words without facsimiles, but they exist nevertheless, and tell their own tale without any possibility of doubt.

The French used before the oral pleadings ceased to be in French seems to be, for the most part, that of persons familiar with the language. The apparent anomalies are only those of the *Langue d' Oil* before it finally settled down into the accepted modern forms. The manner of writing indiscriminately *avoir* and *aver* (to have) *recoverir* and *recoverer* (to recover), *maner* and *manoir* (a manor), *il* or *ils* (they), and innumerable other inconsistencies do not necessarily indicate, as has sometimes been supposed, a jargon of English growth, or of the school of Stratford — atte — Bowe, but are in accordance with the use of the *Langue d' Oil* as written and spoken on the other side of the Channel. The earlier language of the Year Books is indeed of unique philological value, for it is a representation or an attempted

representation of the language of everyday life as actually spoken, to which the nearest approach in most of the dead languages is that of the Drama. A study of this old French, from which a portion of our modern English is derived, might indeed have saved some of us from corrupting our own speech into a jargon. We should not, perhaps, have converted *un nounpiere* or *nounpiere*, into "an umpire;" we should not perhaps use the expression "that is tantamount to saying" for the simple *tant amounte* of the Year Books; and we might have escaped from that greatest of spoken abominations "a valuable asset." It is probably needless to remind any one who is likely to read these pages that "asset" is a monstrous singular taken out of a non-existent plural "assets." The word "assets" is nothing but the "*assetz*" of the Year Books (the modern French *assez*) which was used chiefly in relation to the old doctrine of warranty — the question commonly arising whether some person had *assetz* (the Latin *ad satis*), or land to a sufficient value for the purpose of satisfying the warranty.

The records or rolls, on which the reported cases (with innumerable others) may usually be found, are very different in character from the MSS. of Year Books. By the Act of the 36th year of Edward III., which substituted English for French in the oral pleadings in Court, it was provided that entries and enrolments should be in Latin. This, however, introduced no new feature. Domesday Book and the earliest rolls of the Exchequer are in Latin, the earliest Fines (of the reign of Henry II.) are in Latin, and the earliest judicial proceedings (of the reign of Richard I.) are also enrolled in Latin.

Before, as well as after the Act, the records of the Courts of King's Bench, Common Pleas and Exchequer, of the Justices in Eyre, and of the Justices of Assise were enrolled in Latin. After, as well as before the Act, there might be recitals on the rolls in French. In the Chancery the French Bill

was the predecessor of the English Bill, and was not affected by the Act, though the enrolments in Chancery of Letters Patent and Letters Close were always in Latin. For some reigns after the Act, too, the language of the Rolls of Parliament continued to be, in part at any rate, in French.

All these rolls have to be consulted, at times, for the proper illustration of the reported cases, but those which have to be most frequently used are rolls of the Courts of Common Pleas and King's Bench, and in the earliest times the rolls of the Courts of Eyre.

It must not be supposed, that where there is a French report and a Latin record of the same case, the one is a mere translation of the other, and contains precisely the same information. The arguments of Counsel and the pleadings for which they attempt, but fail, to gain acceptance are all omitted from the final record—the plea or judgment roll.

In this, however, the pleadings, as allowed by the Court, are entered, followed by the verdict, if the case went so far, and the judgment, both of which are often omitted from the reports. In this, too, the names of the parties and the parcels of land (often wanting or erroneously stated in the reports) are set down with incontrovertible authority. The orthography is more uniform in the Latin of the rolls than in the French of the Year Books, and is indeed fairly well fixed, except in the names of persons and places. The writing is abbreviated but not quite so much as in the reports.

On the other hand, the rolls present difficulties of their own, and are full of pitfalls for the uninitiated. In the reports each action is usually described by its appropriate technical name, e. g. Aiel, Cosinage, Debt, Entry, Formedon, Mesne, *Quare impedit*, Right, etc. In the rolls it is otherwise and a knowledge of the formal words used in each action is necessary for the purpose of distinguishing one kind of action from another. The names of most of the

old actions are French, and very terse French, too, while the Latin writs which were used were in accordance with a set form that did not even necessarily include any Latin word equivalent to the French title. There is a notable instance of this in the term "Attaint." The word never occurs in a writ of Attaint; and in Letters Patent and Close the action is commonly called a "*Jurata viginti et quatuor militum ad convincendum juratores*" of an Assise of Novel Disseisin, or as the case may be. Some curious mistakes have in consequence been made by officials unacquainted with the forms, but the details might be out of place in this article. Even when the name of the action has preserved a Latin garb there may not be any use of that particular description in the record of the case. The distinctive words, for instance, in the record of a *Quare impedit* do not include the word "*Quare*" at all, but are *Quod permittat præsentare*, and for this reason a *Quare impedit* has, before now, been described as a *Quod permittat*, which is an action of a totally different kind.

The greater part of the cases in the Year Books were heard in the Court of Common Pleas, the records of which are probably the most technical that can be found. Most even of the actions of Assise (of Novel Disseisin, etc.), which are reported, were removed into that Court from the Courts of the Justices of Assise, *propter difficultatem*. On the Plea or Judgment Rolls of the Common Bench are consequently to be sought the majority of the records corresponding with the reports.

The Court of Common Pleas was described by Sir Edward Coke as the lock and key of the Common Law, and it is almost needless to say that its records are of the highest value not only for the history of the Law, but also for the social history of the country. Yet, owing probably to the difficulties which they present to the unlearned, nothing has been done except incidentally to make their

contents, or even the general nature of them, known to the public. The last seven volumes of Year Books published in the Rolls Series (12-16 Edward III.) contain references to records illustrating the reported cases, with some extracts making good the deficiencies of the reports themselves; but it is, of course, beyond the province of the editor of the Year Books, in that capacity, to touch the unreported cases, which outnumber enormously the cases reported.

The Plea Rolls of the Common Bench of the reign of Edward III., when the court was in full working order, were made up term by term, the individual skins of each term-roll being strongly sewn together at the top with cord. Each skin is about 33 inches long, and 10 inches broad. The average number of skins constituting each roll is about five hundred and fifty, and the writing is on both sides of each skin. From these facts some idea may be formed of the amount of legal business transacted in each term at a time at which the *laudator temporis acti* is apt to suppose that litigation was small in quantity, that the administration of the law was simple and inexpensive, and that the law's delays were as yet unknown.

Much of the space, it is true, is taken up with matters of minor importance, such as renewals of jury-process, prayers for view and grants of it, entries of *Non Pros*, etc. The records, however, of cases pleaded to issue would probably be found to average not less than one to a skin, and the total number to be fully ten times that of the reported cases.

These rolls, to which there is no index, and no published calendar, do not in themselves afford any clue to the discovery in them of any case for which search may be made, except the bare name, in the margin, of the County in which the lands in dispute might happen to be, or in which the dispute about other matters had originated. The cases belonging to each County are not brought together, but interspersed with those

belonging to other counties, so that the whole roll may have to be examined before any particular case can be found. For the purposes of comparison with the Year Books the labor can be abridged only by making a short abstract of each reported case, and comparing each skin of the roll with the abstract, so that one examination of the whole roll suffices for all the cases. It need hardly be said that even this is a very laborious process. A project for preparing a Calendar of the Rolls, *pari passu* with the editing of the Reports, stands over for the present, for want of express Treasury sanction.

Some of the earliest reports relate to proceedings before Justices in Eyre, whose Court was superior even to that of the Common Bench, though inferior to that of the King's Bench. When the Court of the Eyre was in any County, all the actions of that County which might be pending in the Court of Common Pleas were immediately transferred to the jurisdiction of the Justices in Eyre. For this reason the records of the Courts of Eyre in some instances stand in place of those of the Common Bench and are even of greater importance. They include Pleas of the Crown as well as Common Pleas, though the two classes are usually kept distinct. The rolls of Common Pleas which are among them resemble those of the Court of Common Pleas, and require the same technical knowledge for their interpretation.

The use of the Rolls of Parliament in illustration of the cases reported in the Year Books depends upon a principle well recognized from the time of Edward I. until the middle of the reign of Richard II. This was not only that Parliament was the highest Court for redressing errors after judgment given, but also that during the progress of an action even in the Court of Common Pleas, a party might present a petition to the "King in his Council in his Parliament," praying for a direction to the Justices as to the admission of pleadings or the mode of proceeding. When the petition was granted,

a writ was sent, through the Chancery, to the Justices of the Common Bench conveying the instructions as prayed. Such writs usually appear as part of the record of the case upon the rolls of the Court of Common Pleas, but the petitions themselves, whether granted or not, have to be sought on the Rolls of Parliament, or if not there enrolled, among the separate Parliamentary Petitions. They are of much importance in the history of the law because they afford a connecting link between Common Law and Equity. They usually have in them the characteristic words "*pur Dieu*" ("for God's sake"), which are also in the Bills, or Petitions addressed to the Council, and in later times to the Chancellor alone, for the purpose of commencing a suit.

The records of the Court of King's Bench have also to be consulted, in aid of the reports, for two distinct purposes. Some of the few reported Crown cases are there to be found, as well as all the proceedings in Error upon judgment in the Court of Common Pleas, and in some other Courts, including the Court of King's Bench in Ireland. The early King's Bench Plea or Judgment Rolls are in two parts, the skins of both of which, however, are sewn together at the top in the same manner as the skins of the Common Bench Rolls. One part has the name of the Chief Justice at the head of each skin, the other part the word "*Rex*," and the skins of each part have a separate numbering. In later times the two parts were separated, one being assigned to the Plea Side, the other to the Crown Side, of the Court. The Crown cases are found upon the "*Rex*" part of the earlier rolls, the proceedings in Error and some other matters on the part bearing the name of the Chief Justice.

The proceedings in Error constitute the most important portion of these Rolls in relation to the Year Books, as they show all the assignments of error and subsequent pleadings with great precision, together, of

course, with the affirmance or reversal of judgment. They also include a copy of the whole record of the case in the Court below, which might serve as a substitute should the original by any chance be lost.

During the progress of cases in the Court of King's Bench, as during the progress of cases in the Court of Common Pleas, petitions could be, and not uncommonly were, addressed by the parties to the King in Council in Parliament, and then went through the same course.

It sometimes happens that an Assise Roll ought to be consulted for the purpose of illustrating some of the points which may have arisen in an action of Assise. When the case has been removed into the Bench *propter difficultatem*, it is sometimes found that there are several Assise Rolls relating to the same case which differ *inter se*. In a case, for instance, in Trinity Term, 13 Edward III. (No. 61, *Boddenho v. Derby* and others) there are no less than four Assise Rolls besides the enrolment among the *Placita de Banco*. In these there are material variations extending even to the writs sent from the King to the Justices of Assise, in consequence of petitions from the parties, or otherwise. The record as sent into the Common Bench is, of course, that which must be accepted as correct, if so accepted by the Common Bench itself either after objection, or when no exception has been raised. It is, nevertheless, obvious that there may be occasions when the Assise Rolls themselves may be of considerable importance where questions have arisen as to the correctness of the record sent in to the Bench.

Instances do also occur, though rarely, in which the reported cases have been argued out and determined before the Justices of Assise alone without any reference to the Common Bench. It is not always easy to discover the corresponding Assise Roll for two reasons: one that the series of Assise Rolls in the Public Record Office appears to be incomplete, the other that the arrange-

ment of them is faulty. In Easter Term 17 Edward III., however, the Assise Roll corresponding to a report of a case determined by Justices of Assise at York, without any adjournment into the Common Bench, has been discovered. The case is numbered 25 in the old editions of the Year Books, (fo. 28). It is an Assise of Novel Disseisin brought by one Geoffrey Cotes. As it is there printed it is really not intelligible, or, if intelligible, not in accordance with the facts, because a certificate, which the report does not even show to have been that of a Bishop, is there represented as having been produced in the action of Assise itself, whereas the Assise Roll clearly shows that it was a Bishop's certificate produced in a previous action in the Common Bench, the whole record of which was sent to the Justices of Assise. The Assise Roll also gives further particulars of importance.

There are cases also in which it might be possible to correct a report by reference to Rolls of Justices of Gaol Delivery, or Rolls of Justices of Oyer and Terminer, acting under distinct commissions, even though they might by virtue of other commissions have acted as Justices of Assise. An Assise Roll was not so called because it contained all the proceedings at Assizes; and modern Assizes have nothing whatever to do with the proceedings of Justices of Assise in the oldest sense of the term, because actions of Assise have long been abolished, and had fallen into disuse long before an Act of Parliament put an end to them. The early Assise Rolls properly so called contain only the records of actions of Assise. Ignorance of this fact and of the nature of the Jurisdiction of the Justices in Eyre has led to great confusion in the classification of the records, which is a serious hindrance to students. In case of absolute need, however, the difficulties can be overcome, where the records exist, by those who know how to conduct the search.

Cases now and then occur in the Year Books which were heard in the Chancery,

and these may be of very great importance—as for instance the *scire facias* to revoke a charter to the Burgesses of Wells in the sixteenth year of Edward III. These again may be identified with corresponding records of the Chancery which, however, are susceptible of a much better classification than they have yet received.

There are also some Exchequer cases in the Year Books, apart from those of the reign of Edward I. with which the first volume of Year Books, published in 1678, commences. The latter are merely extracts from Remembrance Rolls of the Exchequer, and though they are in themselves of value, they can hardly be said to be in place in a volume of Year Books, when not associated with any reports.

The Remembrance Rolls, however, both of the King's Remembrancer and of the Treasurer's Remembrancer are occasionally of service in illustration of reported cases, as, for instance, in the case relating to the farm of a fair to be recovered as in right of the King (Easter 14, Edward II., No. 54, and Introduction) with the questions of jurisdiction to which it gave rise. It is a common error to suppose that all matters relating to pleas in the Court or Exchequer are to be found in the Plea Rolls of the "Exchequer of Pleas." The gradual distribution of the Exchequer business among the various branches of the Court is in itself a difficult subject of very technical learning; but here, as everywhere else, the Year Books illustrate the records, and the records illustrate the Year Books.

It is, of course, of the utmost importance to know in what capacity those persons are speaking whose speeches appear in the reports. It is quite exceptional to find this noted in the Year Books themselves, Counsel and Judges being usually indistinguishable, so far as any definite statement or difference in writing is concerned. Here again the records are our guides, though they do not show the names of the Judges who sat, or of the

Counsel who pleaded, in any particular case. The name of the chief Judge of a Court appears in the heading of the Plea Roll of that Court, but not the names of his associates, the *puisne* judges. As, however, the Judges were appointed by Patent, their appointments may be found on the Rolls of Letters Patent, and their patents are sometimes, but not always, transcribed also on the rolls of the particular Courts in which they were to act. So far as the Court of Common Pleas is concerned, too, the names can always be checked by the "Feet of Fines," in which fines of lands are represented as having been levied before all the Justices of the Court.

When the names of all the Judges are known, it is a fair inference that the other persons named as speaking in Court are Counsel. This inference again is susceptible of verification, so far as the Common Bench is concerned, because, although the names of Counsel appearing in any particular action are not stated, the names of the "*narratores*" or countors who received chirographs of fines on behalf of their clients appear at long intervals on the Plea Rolls. With these the names of the persons who were not Judges can almost always be identified, and thus not only the names but the usual way or rather ways of spelling them can be ascertained.

LONDON LEGAL LETTER.

LONDON, August, 1900.

THE most notable event of the past month in English legal circles, so far at least as American lawyers are concerned, was the dinner of the Bench and Bar of England to the Bench and Bar of America. It came about through the desire of a number of English judges and lawyers who have visited the United States within the past few years, to return the hospitality that had been so generously extended to them, chiefly by the members of the American Bar Association. It was naturally thought that on account of the special attraction of the Paris Exhibition an unusual number of American judges and lawyers would visit England this year and that this would therefore be an exceptional occasion for such an entertainment. In ordinary years there are hundreds of the legal fraternity of the United States in London during July, August and September. Again and again it has happened that the leaders of the Bar of a score of States might have argued cases, here in England, not merely before judges of their own courts but before Federal judges and judges of the

Supreme Court of the United States. But this year notable judges and lawyers, those of national reputation in America, have been conspicuous by their absence, and it seemed at one time that the English hosts would have to reckon without their guests. However, over forty American judges and lawyers, several of them of eminence, were present, and they will convey home with them a lasting impression of English good-will and friendship. They will also consider that in sitting at the hospitable board of their English brethren they were acting as representatives of the Bar of America generally, for whom this expression of courtesy was intended.

The banquet was exceptional in many respects. In the first place it was held in the old historical hall of the Middle Temple in which Shakespeare personally "presented" as Mr. Frohman would phrase it, two of his plays, and in which Queen Elizabeth deigned to dance; whose walls almost up to the vaulted ceiling are lined with tablets and screened windows bearing the names and arms of the foremost lawyers of the Eng-

lish-speaking people; and whose covered oak screens, black with age, are among the finest in Europe, and in which every lawyer for two or three hundred years, who has been called to the Bar by the Middle Temple must have "eaten his dinner."

The chair was occupied by the Lord Chancellor. The Lord Chief Justice, who had hurried up to London from Circuit for the purpose, had intended to support him, but owing to illness, was obliged to be absent. Nearly every judge of the High Court, including those of the House of Lords and the Appellate as well as the Queen's Bench and Chancery Divisions, was present, while there was hardly an absentee from the ranks of working Queen's Counsel and Jurors. Such a gathering of English judges and lawyers upon any occasion, professional or social, has rarely if ever occurred. Certainly not within the memory of those now at the Bar. In addition to these hosts there were present as guests, but guests invited to assist in doing honor to the American visitors, representatives from practically every part of the United Kingdom and many of the great dependencies of the Crown. There were judges from the Court of Sessions of Scotland, distinguished judges from Ireland, judges from India, from Australia, from the Cape and from Canada, and even from the far East.

The after-dinner speeches, after "Grace after meat" had been sung by the choir boys of the old Temple Church, were full of genuine and spontaneous fraternity and a feeling not only of kinship but that so long as the common bond of a common law united the two communities there could never be dissension and division between them. The keynote struck by Mr. Choate in proposing the health of the Queen was preserved throughout the evening. He was as usual graceful and eloquent, and it was a matter of regret that his official position as Ambassador precluded him from replying for the American Bar. The toasts included the President of the United States. "The Bench and Bar

of America" was proposed by the Lord Chancellor and eloquently responded to for the Bench by Judge Baldwin of Connecticut. He said that what above all else bound the American people together was the one underlying system of jurisdiction which they inherited from their ancestors. This unity of the common law stretching across the American continent, from Maine to California, had permeated and inspired all American institutions, and had welded together all the States by ties that no written constitution could ever create. For more than two centuries Westminster Hall was the Mecca of the American lawyer when he crossed the sea. Westminster Hall had lost its judicial character, but as the American visitor entered the venerable hall of the Middle Temple he could still have something of the feeling of coming home. Their legal ancestry was the same. Coke, Mansfield and Blackstone, and the whole great panoply of English lawyers in every century preceding the present were their legal ancestry. Their knowledge of the common law was inherited by them directly from men who went out from the Temple to the wilds and woods of Massachusetts Bay. The first governor of the first English colony in America which elected a governor—John Winthrop—was a barrister of the Inner Temple, and at his council board were others educated in the Temple. Wherever the English tongue had gone, the English law had gone also. It had followed because of its fitness for free men, because of its power of adaptation to new environments, because it was capable of growth as the world grew, because it was a system of principles rather than of rules. Daniel Webster once spoke of the morning drum-beat by which the English garrisons around the globe were ready in every land to salute the sun at his coming. It might be even England's higher pride that wherever her people went her law followed. They were all ministers and officers of this one system of common law. Some of their States

clung more closely than England had done to its ancient forms; but in loving devotion to all that made English law what it really was, Americans and Englishmen were one, standing, as it were, under the same flag—not the flag of the country, but of the country's laws—the flag of the common law of England—a flag that cast no shadow of injustice, and floated only over the free.

Mr. James E. Beck, an Assistant Attorney General of the United States, carried off the honors of the postprandial oratory in his response for the American Bar. The other toasts were "The Other Guests" proposed by Lord Alverston, the new Master of the Rolls, better known to Americans as Sir

Richard Webster, and responded to by Edward Blake, Q. C., of the Canadian Bar; the "English Bench and Bar," proposed by Mr. Francis Rawle, the Treasurer of the American Bar Association, and responded to by Lord Justice A. L. Smith, and the Attorney General. The health of the Chairman was proposed by the Lord Chief Justice of Ireland, and by Mr. Chauncey M. Depew.

Altogether the occasion was a notable one and the only regret expressed by hosts or guests is that there was not a larger representation present of the judges and lawyers of the United States, in whose honor the gathering was arranged.

STUFF GOWN.



The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

FACETIÆ.

"No man," said a wealthy, but weak-headed barrister, "should be admitted to the Bar who had not an independent landed property." "May I ask, sir," said Mr. Curran, "how many acres make a wiseacre?"

AN old farmer was on his deathbed. He requested that two lawyers from a neighboring town be sent for. When they came he motioned them to take seats, one on each side of the bed. He looked from one to the other for a few moments, and then with his last breath exclaimed: "I die content, like my Savior, between two thieves."

Two Irishmen being about to be hanged, the gallows were erected over the margin of a river. When the first man was drawn up, the rope gave way; he fell into the stream, and escaped by swimming. The remaining culprit, looking at the executioner, said with genuine native simplicity, and an earnestness that evinced his sincerity: "Do, good Mr. Ketch, if you please, tie me up tight, for if the rope breaks I am sure to be drowned, for I can't swim a stroke."

THE most popular man in a western town once got into a difficulty with a disreputable tough, who was the terror of the place, and did him up in a manner entirely satisfactory to the entire community. It was necessary, however, to vindicate the majesty of the law, and the offender was brought up for trial on a charge of assault with intent to kill. The jury took the case and were out about two minutes, when they returned.

"Well," said the judge, in a familiar, off-hand way, "what have the jury to say?"

"May it please the court," responded the

foreman, "we, the jury, find that the prisoner is not guilty of hittin' with intent to kill, but simply to paralyze, and he done it."

The verdict was received with applause, and the prisoner given an ovation.

NOTES.

MR. BODKIN, Q. C., tells the following anecdote of the late Mr. Francis Macdonagh, Q. C., who was for upwards of forty years the recognized leader of the Irish Bar: "I remember once in the early glory of my wig and gown I got a case for an opinion. The solicitor thought it a very simple case or he would not have sent it to me. I thought so, too. With the touching confidence of the neophyte, I took my pen and began: 'I am clearly of opinion.' Now it so happened that I sat in the law library beside the silver-haired silken Nestor of the Irish Bar, a leader of unfathomable astuteness. This elder chanced to glance over my shoulder as I wrote. 'My dear young friend,' he said softly — we were all his dear young friends — 'Never write that you are clearly of opinion on a law point. The most you can hope to discover is the preponderance of the doubt.'"

IN Colonial days in Virginia there was a famous lawyer, Gabriel Jones, known throughout the Colony as "the great Valley lawyer." He was the King's attorney and drew the will of the eccentric Thomas, Lord Fairfax, which disposed of his immense landed estate that included land now comprised in seventeen counties in Virginia and five in West Virginia, and his hunting lodge in the Virginia mountains, where George Washington stayed when a young surveyor, and which is famous in song and story. Mr. Jones was greatly beloved and revered by the bench and the bar of Virginia. In his old age, it is said, he became very irritable, and was one day so rude in Court, to a young lawyer who displeased him, that the presiding Judge felt the dignity of the Court required

some notice should be taken of it. Of course, it was out of the question to think of reproving Mr. Jones, so the Judge fined the young lawyer for provoking him.

A CERTAIN M. Veaudiau was run down by a cab in Paris and laid up for six months. He brought action against the cab company, fixing the damages at 40,000 francs, this being, according to his counsel, the monetary equivalent of the damage caused by reason of his being unable to follow his profession. M. Veaudiau's profession is that of embalmer, and he charges from 1,000 to 3,000 francs for embalming ordinary people; but when his subjects are persons of distinction, his fees are higher. He received 5,000 francs for embalming Dom Pedro, the ex-Emperor of Brazil; 10,000 francs for doing the same thing to the King of Hanover; whilst the untitled republican, Gambetta, cost only 4,000 francs to embalm. It will be well for the Paris *cocher* to ascertain in future the profession and the fees of anyone whom he contemplates running down.

THE time of the English courts continues to be occupied largely with what the Lord Chief Justice calls "trumpery libel suits." Two decidedly amusing suits were dismissed without much ceremony recently, one by the Lord Chief Justice and the other by Justice Hawkins. In one instance, in an account of a proceeding in court, the word "defendant" had been printed in place of "plaintiff," with the result of making a lawyer in his address charge his own client with being an "extortioner." The client had sued the paper for damages as the result of this blunder, but when the Lord Chief Justice heard the facts in the case, he at once said he doubted if there was any cause for action, since any one reading the account would see that it was a mistake of the reporter or printer. Furthermore, a correction had been made by the newspaper, but of this it was complained that it was "not prominent," and was not accompanied by an apology. The Lord Chief Justice held that no reader of intelligence could fail to see that a mistake had been made, and when counsel for the aggrieved person urged that there "might be careless or foolish people who would receive a different impression," he declared: "But legislation and law are not intended for foolish

people,"—a view which precipitated the collapse of the case.

In the other instance a lawyer brought suit against two newspapers for conspiracy and libel in habitually leaving his name out of their reports of court cases in which he appeared as counsel. Justice Hawkins made short work of this, saying to counsel for the plaintiff, who wished to cite decisions in favor of his novel plea: "If you want anything to put a final extinguisher upon you, that will do it;" and adding, when counsel said in defence of the claim for damages, that all persons engaged in any way in public had occasionally to complain that what they said was not reported, "What a God-send it is to the public that they are not always reported!"

THE following is a verbatim copy (names only being changed) of a warrant issued by a justice of the peace in one of our New England states.

"State of Vermont }
Caledonia County } ss

"By the authority of the State of Vermont and myself who is a justice of the peace you are hereby commanded to attach the goods, chattels and estate of B. G. Jones and for want thereof take his body and notify him according to law to appear before me at my carpenter shop in Lyndon Centre some day next week in a plea of the case to answer unto Fred Smith of the same County and for a further plea in the case-to-wit- (Copy of my client's contract). Decker-ation day swoped horses with B. G. Jones and he is to pay me \$15. boot in case he don't want to swap back.

"Sined with our hands and sealed with our seals this 31 day of May. F. Smith B. G. Jones To the damage of the plaintiff \$40. for which he brings this suit contrary to form and indignities of the statue and the peace of the state. And ever praying that said wilful and malicious and evilminded Jones and his contingent demurrer be quashed and judgement be entered pro-forma for plaintiff.

"Justice of the peace.

"F. Smith recognized to the defendant in the sum of \$10. for costs of said Smiths expenses.

"F. D. EDWARDS.

"Justice of the Peace."

THE late Robert D. Holmes, once a leading criminal lawyer in New York city, had peculiar views as to selecting a jury. He was an approved gastronome, and one of his questions to a juror who had been called for examination as to his qualifications, would be, "What did you breakfast upon this morning?" If the juror answered, for instance, sausage or pork chop, or anything else that Holmes thought indigestible, he would peremptorily challenge such juror. Said Holmes, when chaffed about it, "I do not care so much about preconceived opinions of a juror, because good evidence and a good argument can change opinions; but I do not choose to submit the life or liberty of a client to the brain of a man whose stomach is clogged with indigestible or brutalizing food." In an important case he would always procure a copy of the jury panel and personally enquire into the habits, mode of life and peculiarities of each juror from his intimates or neighbors. Mr. Holmes was unusually successful in his cases, and he was by no means a deeply read lawyer, but an exemplar of Lord Bacon's saying that "tact in a barrister often outvied learning."

SAYS Chauncey Depew: "The law promotes longevity. It is because its discipline improves the physical, the mental and the moral conditions of its practitioner. In other words, it gives him control over himself, and a great philosopher has written that he who could command himself is greater than he who has captured a city. The world has been seeking for all time the secrets of longevity and happiness. If they can be united, then we return to the conditions of Methuselah and his compatriots. Whether I may live to their age I know not, but I think I have discovered the secret of Methuselah's happy continuance for nearly 1,000 years upon this planet. He stayed here when we had no steam and no electricity, no steamers upon the river or the ocean propelled by this mighty power, no electric light, no railways spanning the continent, no overhead wires and no cables under the ocean communicating intelligence around the world, and no trolley lines reducing the redundant population. He lived, not because he was free from the excitements incident to the age of steam and electricity, but because of the secret which I have discovered, and it is

this: Longevity and happiness depend upon what you put in your stomach and what gets in your mind."

A STORY is told of the late Hall McAllister, who, while eminently brilliant in all other respects, was not particularly endowed with that stern business sense that shows the more practical man how many cents go to make a dollar. Well, it occurred to McAllister, shortly before his death, that it would be a good idea to purchase a memorandum book in which to jot down the items of his daily expenditure. "I can compare notes from day to day," he said, "find out how much I spend, and so learn to regulate my expenditure here and there."

So the book was bought. After the great lawyer's death, his executors while going over his effects came across the book. Interested to know how far successful McAllister had been in "regulating his expenditures," they opened the book to find this, the sole item contained therein:

"To one memorandum book, 25c."

LITERARY NOTES.

THE September NEW LIPPINCOTT MAGAZINE publishes complete one of the cleverest society novels of the year. It is called "The Dissemblers." The author, Thomas Cobb, is an Englishman who is much appreciated abroad, and his transatlantic success is likely to be repeated in America. So feelingly does he write about Penelope Darnley and her lovers that one feels a suspicion that he may have personated one of the lovers himself—but which one? Besides the complete novel there are short stories by Rev. Cyrus Townsend Brady, Cy Warman and R. V. Risley.

No historian of the war has a higher standing than Major-General Jacob D. Cox, one of the leading actors in it, and at one time Secretary of the Interior under Grant, who is to contribute two important papers of military reminiscences to SCRIBNER's this fall. His first article in the September number is on "The Chickamauga Crisis" when Grant was placed in command and Rosecrans relieved. This article makes clear a much misunderstood episode in the great civil war.

THE September number of THE INTERNATIONAL MONTHLY contains several articles of surpassing and timely interest. Noticeable among these is

"The Expansion of Russia: Problems of the East and Problems of the Far East," written by the great historian of Russia, M. Alfred Rambaud, whose three volume "History of Russia," published in 1883, was crowned by the French Academy. That work has remained the chief authority upon Russia and has been translated into English. The present article, "Expansion of Russia," therefore may justly be considered as bringing Russian history down to the present day, and is especially valuable as an exposition of Russian policy in the East. The article opens with a brief sketch of the history of Russia. It is timely, vigorous and authoritative.

JUDGE FRANCIS LOWELL opens the September ATLANTIC with "The American Boss," his rise and sources of power. Brooks Adams follows with "Russia's Interest in China," a very present question ably discussed. Mrs. Candee pictures the wonders of "Oklahoma," and Canon Rawnsley sketches "Ober-Ammergau." Mrs. Foote begins "The Prodigal," a brilliant short serial. A notable group of great general interest comprises Paul More's "Ancient Feud," apropos of Tolstoi. Margarethe Müller's "Gerhart Hauptmann," on the recent German Renaissance; Canon Everett's "James Martineau;" Ogden's "The Press and Foreign News," in praise of old methods; Trent's "Old Southern Newspaper," with appetizing extracts; and Fernald's dissection of a modern kindergarten child. Reviews of "Art Education for Men," "Recent American Fiction," and "Books on Japan;" attractive short stories; brilliant poems and a lively Contributors' Club also appear.

"THE Influence of the Western World on China" is the title of a timely article in the September CENTURY, the writer being the Rev. D. Z. Sheffield, D. D., for thirty years a missionary in the Middle Kingdom. Dr. Sheffield sailed from San Francisco on June 22, having just learned of the burning of the North China College, of which he is president. The article, written shortly before his departure, is wholly apropos of the present situation, and it contains a powerful protest against any dismemberment of the Chinese Empire. One can learn much about the Boxers from a paper by R. Van Bergen on "The Revolution in China and Its Causes." A second instalment of Jean Schopfer's notes on "Amusements at the Paris Exposition," treats particularly of theaters, panoramas, and other spectacles. The panoramic feature has been carried to the last point of novelty, and without leaving the Exposition grounds one may journey to Siberia by train, to the Mediterranean by boat, and to the empyrean by balloon. Castaigne's vivid pencil supplements the text with many a full-page and smaller picture.

WHAT SHALL WE READ?

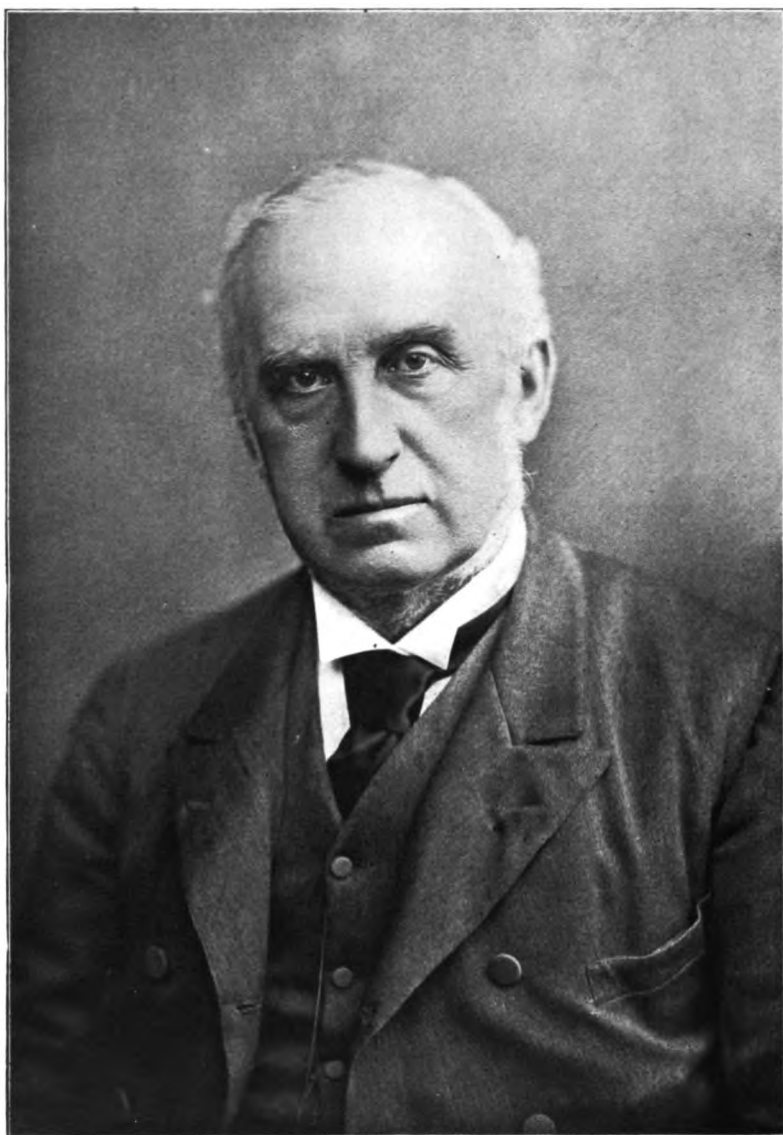
LITTLE, BROWN, AND COMPANY will publish, early in October, *James Martineau: A Study and a Biography*, by Rev. A. W. Jackson. The work was nearly completed at the time of Dr. Martineau's death, and since then has been read and approved by his nearest relatives, who have rendered the author valuable assistance. The volume is not only a life of the great theologian, put also a study of the movement in thought of which he was the leader.

LITTLE, BROWN, AND COMPANY, the publishers of Francis Parkman's histories, announce a *Life of Parkman*, by Charles Haight Farnham, for publication in the early fall. The work has been written with the sanction of the author's relatives, who have given Mr. Farnham access to Mr. Parkman's letters, vacation journals, and all other available material.

MARY DEVEREUX's historical romance of Marblehead, *From Kingdom to Colony*, has been steadily growing in favor, and is mentioned in the Bookman in the lists of best selling books. The publishers, Little, Brown, and Company, are preparing an eighth edition.

THERE are some striking pen pictures of Chinese life in *The Attaché at Peking*, by A. B. Freeman Mitford, who was at one time secretary to the British embassy to China. Mr. Freeman Mitford's book consists of a series of letters describing Taku, Tientsin, Tung-Chow, Shanghai, Peking and Canton, and it is full of shrewd observation and study of Chinese manners and customs. The author had a keen eye, too, for odd and amusing incidents, many of which make very lively and entertaining reading. The book has just been issued by The Macmillan Company.

THE third edition of *The Web of Life* is on the press. While the people of Chicago have resented the use which Mr. Robert Herrick has made of them as "dramatis personæ," the general impression is that he has given a close description of American ideals as exemplified by a certain class of prosperous western people. It is perhaps natural that critics on the Atlantic coast are jubilant over Mr. Herrick's story, and this may possibly be the cause of the Chicagoan's resentment. The Macmillan Company have in hand also a fourth edition of William Stearns Davis's *A Friend of Caesar*. It is very seldom that a book by an entirely unknown writer achieves such a success in so short a time. It is now well on its way towards its tenth thousand, and is being dramatized by a well-known playwright.



LORD RUSSELL OF KILLOWEN.

The Green Bag.

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BOSTON.

NOVEMBER, 1900.

THE LATE LORD CHIEF JUSTICE OF ENGLAND.

BY ONE WHO KNEW HIM.

IT will be of melancholy interest to the members of the legal profession in the United States to know that the last public act of the late Lord Chief Justice was one of courtesy to the American Bar, whose members he held in almost affectionate esteem. He was one of the originators of the dinner of the Bench and Bar of England to the American Bench and Bar, and although absent on circuit and unable to take an active part in the preliminary arrangements for it, he was in close touch with the committee. Finally upon the eve of the dinner he adjourned his work on circuit solely in order that he might come up to town to assist in the entertainment. He reached London in time but was too ill to be present, although no one who heard with regret the announcement of his absence through indisposition had the slightest idea of the gravity of his ailment. Instead of remaining in town for the dinner he proceeded to his country seat at Tadworth Court near the scene of the famous Derby race on Epsom Downs, where he has entertained so many American guests. A week's respite from labor producing no improvement he was brought up to town and, after a consultation by the most eminent specialists, an operation was decided upon. Although considered successful at first, the shock to his system was so great that he succumbed in a few hours. The manifestations of grief at his death were wide-spread and sincere and evidenced a feeling of personal loss to the entire community.

Measured by almost any standard Lord Russell of Killowen was a great man. Even

a stranger meeting him for the first time and unaware of his identity could not fail to recognize that he was in every way far removed from ordinary mortals. His stature, the massiveness of his head, his piercing eyes, the resoluteness of his mouth and the determination in his carriage, never failed to impress one with the conviction that he possessed power and authority. The qualities which gained him success would brook no limitations to the success, and for years he was the unquestioned leader of the English Bar. But those who hold him highest in regard best like to remember him as the judge rather than as the advocate. On the bench he was in manner and appearance an ideal Lord Chief Justice. He was the embodiment, in face and pose and manner of wearing his judicial raiment, of dignity and even terror-inspiring sternness; while at the same time his features would relax into mildness and his musical and, at times, tender voice would indicate that his justice could not fail of being tempered with a large measure of mercy.

It was feared that he would carry to the Bench some of the defects of character for which he was conspicuous at the Bar, such, for instance, as his frequent irascibility and his occasional overbearing manner toward his opponents. But no judge ever more quickly forgot the advocate's manner or more speedily assumed the judicial pose. He was gentleness and kindness itself to the young and nervous barrister, and amazingly patient and helpful with a painstaking lawyer and an honest witness. But woe betide the pertinacious counsel trying to bolster up a bad

defence, or, worse yet, fighting a trumpety or speculative action; or an evasive or mendacious witness. No man was ever keener-scented for fraud than Lord Russell. The first signal when he struck the trail of it was the production of a snuff-box and a huge red bandanna handkerchief, which was waved viciously in the air. Then came a snort of rage, the brow darkened, and the eyes emitted sparks. These signs of approaching storm usually sufficed to stop the bad case or to withdraw the shuffling witness from the box; but if they were disregarded the consequences were awe-inspiring and never to be forgotten by the objects of his scorn.

There is probably no profession in the world so full of heart-breaking disappointments and of brilliant prizes, as that of the English barrister. Thousands of men well equipped and capable of doing the best work have eaten their hearts out waiting year after year for clients that never came. This is true of the majority who are called to the Bar. The minority get their chance, through accident sometimes, but generally through connection or influence. The few that make great successes get the great rewards of fame and fortune and title and social honors. Lord Russell literally carved out his own success. He was an Irishman and a Roman Catholic. Furthermore, he had no university degree, although he had taken a partial university course at Trinity College, Dublin; and he was without social influence. He practised law for a short time as a solicitor, at Belfast, and then, doubtless feeling his powers striving within him, decided to go to the Bar, and he entered as a student at Lincoln Inn. After his call he settled as a local barrister at Liverpool, where then, and for many years before, a feeling of intense and aggressive Protestantism prevailed. His progress was sufficiently slow to discourage him, and the story runs that about this time he dined with two other young

limbs of the law who were also in despair of ever getting work enough to afford them a living. Some one suggested abandoning the Bar, joining forces and emigrating to the Colonies, and the proposition was seriously considered. Happily, it was not adopted, as one of the three afterwards became the Lord Chancellor of England and was known and affectionately regarded in America as Lord Herschel; the second was Lord Russell of Killowen, Lord Chief Justice of England, and the third is now the present Speaker of the House of Commons. However slow Lord Russell's progress was at first it was substantial, and his merit in time was generally recognized to such an extent that it was impossible for him to remain as a local at Liverpool and he came up to London. In 1878 he got his first big chance in one of the libel actions brought against Labouchere's *Truth*. The case came on for trial before Sir Alexander Cockburn, in the old Queen's Bench Court at Westminster; and for a "silk" new, or comparatively new, to London, and in a sense upon his own trial in the metropolis, the commencement did not seem propitious to Russell, whose vigorous handling of the plaintiff caused Chief Justice Cockburn to interject some comment as to the proper limits of cross-examination, and to express the opinion that they were being over-stepped. Russell, always fearless at the Bar, even with such an opponent as Cockburn on the Bench, would not give way, saying that the line he was adopting was necessary to the justification of his defence, and he hoped that when his case came to be fully heard by the Chief Justice that he would withdraw what he had said, and in the meantime suspend his judgment. At the conclusion of the trial when both Russell and his defence had been heard, Cockburn was generous enough to publicly withdraw every word of injurious comment which had fallen from his lips, and in paying a high tribute of praise to the defendant's advocate

went on to blame himself for an interference, which, on reflection, he admitted had not been warranted.

After this triumph his career was one of uninterrupted success and, as some one has aptly said, for twenty years afterward the history of litigation in England was his history. No American lawyer, however successful in the courts of his own State, can fully realize what it means to be such a leader as the leadership of the English Bar implies. Everything in the world-wide Empire of England centers in London. Charles Russell was in almost every important case that came from the Colonies or Dependencies to the Privy Council. Whether it involved a question of caste in India, a contest in administration in Canada or a dispute in mining rights in Australia or South Africa. He was one day in the Court of Appeals, the next in the House of Lords and the next again back on the Queen's Bench putting his back into a jury case. Strenuous work, unremitting attention to details, quick and unerring grasp of the central point in issue, wonderful lucidity of arrangement and statement and overbearing masterfulness, were his distinguishing characteristics, both as an advocate and as a judge.

He was an impressive speaker rather than an eloquent one. He made few notes and probably never considered his phrases or his peroration, but his presence was inspiring, his voice was musical and his diction dignified and powerful. Unquestionably he had but little, if any, sense of humor, and it was only by an effort that he could see the point of Sir Frank Lockwood's spontaneous and capital chaff. One bon mot of his will, however, be long quoted. Asked in court on one occasion, by a perplexed junior, what was the penalty for bigamy, he quickly responded, "Two Mothers-in-law." His very inability to feel the humor of a situation often provoked the hearty laughter of the court. His friend, Charles Matthews, tells this incident of him :

In Mr. Russell's young days in "silk," when the late Mr. Justice Denman was going the Northern Circuit, just before the rising of the Court on a warm summer afternoon, some very high words were flung from the Bar to the Bench, in a tone and with a vehemence which caused the learned Judge to say that he would not trust himself to reprove them in his then condition of sorrow and resentment, but would take the night to consider what he ought to do, and when they met again the next morning he would announce his determination. In considerable commotion the Court broke up, and on the following day it was crowded, in anticipation of a "scene" — an anticipation somewhat encouraged by Mr. Justice Denman's entry into court with, if possible, more than ordinary solemnity, and, on taking his seat, commencing the business of the day by saying, "Mr. Russell, since the Court adjourned last evening, I have had the advantage of considering with my brother Judge the painful incident. . . ." Upon which Russell quickly broke in with, "My Lord, I beg you will not say a word more upon the subject, for I can honestly assure you that I have entirely and for ever dismissed it from my memory" — a turning of the tables which evoked such a roar of laughter in the court that even the learned Judge himself could not but join in it.

It is a question whether the history of England will ever produce his superior both as an advocate and a judge ; but already the gossips are considering who shall be appointed to his place. The consensus of opinion points to the present Master of the Rolls, Lord Alverstone, better known to all Americans and most Englishmen as Sir Richard Webster ; and no one either on the Bench or at the Bar is more worthy. Under ordinary circumstances Sir Edward Clarke, who is now the undisputed leader of the Bar and who has refused the Mastership of the Rolls, could not have been passed by. But Sir Edward lost touch with the government and the people of England by opposing the policy of the government with respect to South African affairs, and although politics do not control in judicial appointments, they cannot be altogether disregarded.

ECCENTRIC TESTAMENTARY TRUSTS.

BY JOHN DE MORGAN.

TESTAMENTARY arrangements of property have been made ever since the individual right to hold property was recognized, and through all the ages men have left on record proofs of their eccentricity in the shape of strange bequests.

Property and money have been devised for the benefit of future generations and for objects which appear to us ridiculous.

Lawyers have been kept busy, courts have been appealed to, and legislatures called upon to assist in interpreting such bequests and to find a way by which the desire of the testator could be best observed.

Since the passing of the statute, 43 Elizabeth, the English courts, in their desire to carry out the wishes of the donor, have applied what is called the *cy pres* doctrine; that is, when the donor's scheme could not be carried out they would construct another scheme as near the original one as possible.

It is not with the ordinary charitable trusts that we have to do but only with some which excite the wonder of the present generation.

When Edward VI. founded the hospital for foundlings and orphans, called Christ's Hospital, but commonly known as the "Blue-Coat School," he ordered that "through all generations" the boys should wear a costume consisting of a blue woolen gown or coat with a narrow red leather girdle round the waist, yellow breeches and yellow stockings, a clergyman's bands at the neck, and a small blue worsted cap, but this last they seldom wear, and are generally seen going about bareheaded. This costume has been retained through all the generations since the foundation of the hospital, and although only the children of the wealthy or influential can now be educated there, the ridiculous garb must be worn. Peter Symonds, in a will dated 1586, bequeathed a sum of money for the

purpose of giving sixty of the younger boys of Christ's Hospital, every Good Friday, "a new penny, a bun and a packet of raisins, providing that they attend service, on that day, at the Church of All-Hallows, Lombard street." Other bequests to this school provide that, on Easter Tuesday, the boys shall receive from the Lord Mayor of London, "a glass of wine and two currant buns," together with a sum of money varying from a shilling to a guinea, according to the class in which the boy may be.

Thomas Walker, of the parish of St. James, Bristol, England, by his will dated April 25, 1666, ordered that the sum of £200 be set apart to purchase "for ever the sum of £10 8s. 0d. a year, for eight poor house-keepers that are known to live in the fear of God, and to come to the church every Lord's day, a six-penny loaf of bread every Sabbath day, after morning prayer, unto these eight poor house-keepers for ever; but for God's sake let them be no drunkards nor common swearers — nor that do beg in the streets from door to door, but let them be quiet people that do desire to live in the fear of God. Pray let their bread be wheaten bread and proper weight as it ought to be."

If the money originally bequeathed was properly invested it would by this time be enough to provide for a great many more than the church could accommodate.

A testator, with the name of James Jocham, and dying in Bristol, bequeathed the interest of £1,000 to his son, on condition that he should pay out yearly to the ministers, clerks and sextons of the parishes of St. Augustine in Bristol and St. Augustine in Newnham, the sum of "three guineas, that is to say, one guinea to the minister of each parish, and half a guinea to the clerks and sextons of each parish, to be divided amongst

them equally, for preaching a sermon on the 14th day of May yearly, forever, the text to be taken out of the Common Prayer Book on these words, 'O, all ye works of the Lord, bless ye the Lord, praise Him and magnify Him forever.'"

Everyone has heard of the celebrated "Dunmow Flitch." This was a prize instituted at the little village of Dunmow, in Essex, England, in 1244, by bequest of Robert de Fitzwalter, on the following conditions: "That whatever married couple will go to the priory, and kneeling on two sharp pointed stones, will swear that they have not quarreled nor repented of their marriage within a year and a day after its celebration shall receive a flitch of bacon." A flitch is the entire side of a pig cured in one piece. Whether the people of Dunmow were too modest or that they found the conditions too irksome, it is a fact that no couple claimed the flitch for two hundred years after the bequest was made, and between 1244 and 1751 only five couples had been able to comply with the conditions, and after the latter year a hundred and four years elapsed before the flitch was again claimed.

Another man who wished to encourage matrimony was John Perram, of Newmarket, who directed, by his will dated 30th of May, 1772, that a sum of money properly invested should be held in trust, and that the trustees should "at least six weeks before Easter, cause notice to be given, as herein directed, that a marriage portion of £21 would be given to a parishioner of the said parish, who should, on the Thursday in the Easter week, be married at the church to a woman belonging to it; neither party to be under twenty, not to exceed twenty-five years of age, nor be worth £20; the trustees to attend in the vestry of All Saints to receive claims, and pay the bequest to such couple as should be qualified to receive it. In case of two claims, the determination to be by ballot who should receive it." Then follows the strangest proviso: "In case of no claim-

ants, then the money, for *that year to be paid by the trustees to the winner of the next town plate at the races.*" A strange mixture of matrimony and horse racing.

This bequest received the sanction of the Court of Chancery in the year 1801.

John Rudge, of Trysull, Staffordshire, evidently suffered in mind through the listlessness of those who attended the services at the parish church, for by his will dated April 17, 1725, he bequeathed twenty shillings a year to be paid at "five shillings a quarter, to a poor man, to go about the parish church of Trysull, during sermon, to keep people awake, and to keep dogs out of church."

Another very eccentric bequest was that made by Henry Greene, in his will dated December 22, 1679, wherein he gave all his property in the townships of Melbourne and Newton, Derbyshire, to his sister, and after her decease, to others in trust, upon condition that the "said Catherine Green should give four green waistcoats to four poor women every year, such green waistcoats to be lined with green galloon lace, and to be delivered to the said poor women on or before the 21st of December yearly, that they might be worn on Christmas day."

The color of the waistcoats was evidently intended to keep his memory "green."

Not in England alone do we find people bribed to remember the dead, for as recently as 1875 in the village of Croane-sur-Marne in France, one Thomas Heviant, among many singular bequests ordered that the sum of two thousand francs should be set apart as a prize to the lucky rider of the winning pig in a race between pigs ridden by men or boys. The bequest was not to be handed over, however, except on the winner giving bonds that he would wear mourning for the deceased during two years after the competition. The municipality accepted the eccentric bequest and ordered a pig race to be run on the Sunday week after the funeral of the testator.

In the days before science had lighted our

streets with gas or electricity, the roads and even busy streets of the cities were dark and treacherous. So we find over a hundred bequests recorded in London alone for providing light in the streets.

John Cooke, by will, dated September 12, 1662, gave to the church-wardens and vestry of St. Michael, Crooked Lane, London, the sum of £ 76, to be invested "to the best profit and advantage" for various purposes, one of which was : "For the maintenance of a lantern and candle, to be of eight in the pound at the least, to be kept and hanged out at the corner of St. Michael's Lane, next Thames street, from Michaelmas to Lady Day, between the hours of nine and ten o'clock at night, until the hours of four or five in the morning."

Six years previously, in 1656, one John Wardell, had bequeathed a sum of money to the Grocers' Company of the city of London, on condition that a lamp with a candle should be kept lighted at the northeast corner of the parish church of St. Botolph, and that one pound should be paid yearly to the sexton for taking care of the lantern.

Another citizen bequeathed a large sum to be held in trust for the purpose of purchasing "stout sticks" for the night watchmen in the parish of St. John, Clerkenwell.

Up to a few years ago a man dressed in the quaint garb of two centuries ago, used to walk round Spital Square, London, every night, carrying a horn lantern, and a long wand, and at every hour he had to call out the time, with the old fashioned *finale* "All's Well !" Every evening at sunset he rang a bell and proclaimed the latest news at the corner of the square, though most of the people had read a better account in the latest "extra." But the watchman had to perform the duties because some parishioner, in the year 1681, had bequeathed a sum of money to the parish on condition that the watchman should make his rounds of the square, nightly "forever."

The law books are full of such eccentric trusts, some of which survive to this day to the enrichment of the trustees and of classes which the testators never intended to benefit.



THE QUAIN'T SIDE OF PARLIAMENT.

EVERY human institution probably has an element of the quaint or the ridiculous in its composition. Certainly, Parliament, with all its solemnity and majesty, as befits the greatest and most powerful legislature in the world, has its quaint side, without which, indeed, the business of law-making at Westminster would often be dull and prosaic.

The rules of procedure which have for centuries regulated the proceedings of the House of Commons are a fruitful source of embarrassment and confusion to new members. Some members, indeed, never thoroughly master the usages of the House, and they go through Parliamentary life with a perpetually reproving cry of "Order! Order!" from Mr. Speaker ringing in their ears.

Even old official members frequently betray their ignorance of the rules of procedure. Lord Palmerston was in the House many years before he became its leader on his appointment as Prime Minister; but he then made the embarrassing discovery that he was inadequately acquainted with the customs of the House, and with a grim determination to at once master the rules, he stuck for weeks to the treasury bench, from the opening of each sitting till its close, with only an hour's interval for dinner, eagerly on the watch for incidents illustrative of Parliamentary procedure. Again, the late Mr. W. H. Smith was not aware, on being appointed Lord Warden of Walmer, at a time when he was leader of the House, that it was necessary for him to vacate his seat, having accepted an office of profit under the Crown; and as he actually entered the House and spoke after his appointment, without having first gone to his constituents for a renewal of their trust, he incurred penalties amounting to £1,500 if any one chose — and the choice was open to every citizen

of the kingdom — to bring an action against him in the courts of law. Mr. Smith did subsequently resign, and was returned again without delay as member for the Strand division of Westminster.

"How can I learn the rules of the House?" asked a newly elected Irish member of the late Mr. Parnell. "By breaking them," was the prompt reply of the Irish leader, who, as is well known, spoke from experience on the point. But few members would care to adopt that heroic method of obtaining the desired knowledge, and their task in mastering the rules is rendered all the more difficult by the curious fact that many of these regulations are unwritten. Some will be found in the Standing Orders or permanent rules passed from time to time by the House to regulate its own procedure; but those that deal with etiquette and decorum have not been officially recorded anywhere, save in a few quaint and obsolete regulations to be found in the old issues of the journals of the House, or the minutes of proceedings taken by the clerk and published daily during the session. For instance, a strange rule for the guidance of the Speaker is set down under the 15th of February, 1620: "The Speaker not to move his hat until the third congee." Propriety of carriage in leaving the chamber is thus enforced: "Those who go out of the House in a confused manner before the Speaker to forfeit 10s." This rule is dated the 12th of November, 1640. Again, we find that on the 23d of March, 1693, it was ordered, "No member to take tobacco into the gallery, or to the table, sitting at committees."

But though most of the rules which regulate decorum in the House of Commons are unwritten, every member is, nevertheless, expected to make himself thoroughly acquainted with them, and every breach of

etiquette, however slight — even if it be due solely to ignorance — meets with a stern rebuke not only from the Speaker but from the House generally.

Every sitting of the House of Commons opens with prayers which are recited by the chaplain. It is a curious circumstance that the two front benches are always deserted at these devotions. Now, it is on the treasury bench and on the front opposition bench that the men who control the destinies of the Empire sit, and surely they stand more in need of divine light and guidance in the discharge of their duties than the unofficial members of the House. Nevertheless, a minister or an ex-minister is rarely, if ever, seen in the chamber at prayers.

It must not be inferred, however, that the great, wise and eminent occupants of the front benches of the House of Commons, in thus absenting themselves from devotions, deem themselves so exalted above ordinary mortals that they stand not in need of prayers. Nor is it, even, that they think themselves past praying for. On the other hand, the regular attendants at devotions must not be regarded on that account as men of deep piety. Probably some members who may be seen every evening devoutly listening to the invocations of the chaplain never attend service elsewhere.

What, then, is the explanation? Well, the House consists of six hundred and seventy members, but only about half that number can be accommodated with seats in the chamber. Consequently, on important and interesting nights there is always a lively competition for places. The scramble for seats on such occasions is regulated by certain rules. A member present at prayers has a right to the place he then occupies until the rising of the House. Each evening stands absolutely independent and by itself, and therefore the title to a seat secured by attendance at prayers lapses at the termination of the sitting.

On the table, in a little box, is a supply

of small white cards with the words "at prayers" in large old English letters. Obtaining one of these cards, and writing his name on it under the words "at prayers," the member slips it into a receptacle in the bench at the back of the seat, and thus secures the place for the night against all comers. He may immediately leave the house, and remain away as long as he pleases. The place may be occupied by another member in the mean time, but whenever the master of the seat — the gentleman whose autograph is written on the card in the little brass slit — returns to the chamber, the temporary occupant of the seat must give place to him.

Thus does piety in the House of Commons meet immediately with the substantial reward of a seat in which to listen in comfort to a long debate. The consequence is that at times of great excitement in the House there is a most edifying display of devotion on the part of members, but in the dull season the attendance at prayers is deplorably lax. And as the occupants of the front benches have their seats secured to them by custom — a custom which now possesses all the force of a law — they never lend the *éclat* of their superior presence to the daily devotions of the House. Old and respected unofficial members of the House, who are in the habit of using certain seats, are, by courtesy, also allowed to occupy these places without dispute or question.

No unoccupied seat can after prayers be retained, as a matter of right, by a member absent from devotions placing a card or a hat or gloves thereon; but it may be so secured as a matter of courtesy. But how is a member to retain a seat until he absolutely secures it for the evening by being present at prayers? Must he enter the chamber early and sit in the seat until the Speaker takes the chair? No, he may leave his hat on the seat, and then betake himself to the reading-room or the dining-room, or to any other part of the palace of Westminster he

pleases. But the hat must be his own workaday headgear. If it is discovered that he has brought with him a second hat and leaves the precincts of the House wearing that hat, he forfeits all right to the seat.

These two regulations have recently been the subject of definite and specific rulings by the Speaker. After the split in the Irish party in 1891, and when the personal relations between the rival sections were very strained, one Irish member took possession of a seat on which another Irish member had placed his hat in the usual way before prayers. On the member aggrieved bringing the matter publicly under the notice of the House, the Speaker declared that he had an unquestionable right and title to the seat, and that the action of the other member in thus taking possession of the seat was a violation of the etiquette of the House. Again, a large crowd of members gathered at Westminster in the early morning of the evening on which Mr. Gladstone introduced the Home Rule Bill of 1892, and when, after hours of waiting, the door giving immediate entrance to the chamber was opened at seven A. M., so mad was the rush to secure seats that several members were crushed, knocked down and trampled upon. Subsequently the Speaker was informed that an Irish member had brought with him a dozen soft hats to Westminster that morning, and with them secured twelve seats for colleagues who did not go down to the House till the ordinary hour of meeting in the afternoon, and the Speaker, repeating a rule made in 1880, laid it down that the only hat which can secure a seat is the real *bona fide* headgear of the member, and not any "colorable substitute" for it. However, during the influenza epidemic of 1893 the Speaker, in mercy for the hatless wanderers in lobbies, departed from the old usage so far as to recognize a card left on the bench as sufficing in place of the hat as a sentinel of a seat to be occupied later on. Curiously enough the innovation, which received fur-

ther sanction on the opening day of the present Parliament, is, in a fashion, a reversion to an ancient practice. On the 21st of February, 1766, according to the Annual Register for that year, "by eight o'clock the seats in the House of Commons were begun to be taken for the members by pinning down a ticket with their names in such seats as they chose, which were reserved for them till prayers began." The reason for the unusual rush for seats on that occasion (four hundred and twenty-two members were present in the House) was the introduction of the bill for the repeal of the famous Stamp Act of 1765, which, imposing certain obnoxious stamp duties on the American colony, had met with the most strenuous resistance from the people of that country.

The hat, indeed, plays an important part in Parliamentary customs. It also contributes occasionally to the gayety of life in the House of Commons. No incident is greeted with more hearty laughter than that of a member, after a magnificent peroration, plumping down on his silk hat on the bench behind him. The bashful and awkward member generally figures in these accidents. Most members have sufficient self-possession, while speaking, to remember to remove their hats from their seats before sitting down; but the misfortune of forgetfulness has befallen even old and cool Parliamentary hands, and the result—a misshapen hat—has completely spoiled the effect of some of their most eloquent speeches. A few years ago a London member sat down, after his maiden speech, on a new silk hat which he had provided in honor of the auspicious occasion, and as he was ruefully surveying his battered headgear, to the amusement of the unfeeling spectators, an Irish representative rose and gravely said: "Mr. Speaker, permit me to congratulate the honorable member on the happy circumstance that when he sat on his hat his head was not in it." The call of "Order! Order!" from the Speaker was drowned in roars of laughter. This London representative en-

joyed the unenviable distinction of being known as "the member who sat on his hat," until some other absent-minded legislator unintentionally established his claim to the title by crushing his headgear in a similarly awkward fashion.

When men meet together in public assemblies, or in social life—as in a theatre or at a reception—the ordinary custom is to uncover while they are seated, and to wear their hats as they enter or leave the place. In Parliamentary life that rule is reversed. Members have their heads covered as they flit about the palace of Westminster, but in the chamber they can wear their hats only when they are seated on the benches. As they walk to their seats or rise to leave the chamber they must be uncovered. This custom is the source of much confusion to new members, and has given rise to many funny *contretemps*. The House never fails to show its resentment of a breach of etiquette, however trivial. It will, without distinction of party, unanimously roar with indignation at a new member who, ignorant or unmindful of the Parliamentary custom, wears his hat as he walks up or down the floor of the chamber. An amusing incident occurred in the early days of the first session of the present Parliament. An offending member, startled by the shout which greeted him as he was leaving the chamber with his hat on his head instead of in his hand, paused in the middle of the floor and looked around with a mingled expression of fright and perplexity. "Hat! Hat!" shouted the House. This only embarrassed him the more. He felt his trousers' pockets and his coattails for the offending article of attire. He even looked at his feet to see if he were wearing it at that extremity of his person. It is impossible to conjecture what might have happened further, had not an Irish member, amid the loud laughter of the House, politely taken off the hat of the confused legislator, and then handed it to him with a courtly bow.

But the story of the humors of the Parliamentary hat is not yet ended. When a member is alluded to in the course of a speech he raises his hat, and he performs a similar act of politeness when a minister answers a question put by him. A member addressing the House stands, of course, uncovered. But that rule does not always prevail. There is an occasion when it is positively out of order for a member to speak on his feet and with his hat off. He must speak from his seat with his hat on his head. When a debate has terminated and the question which has been discussed is put from the chair, an interval of two minutes—during which the electric division bells ring out their summons all over the precincts of St. Stephen's—is allowed to enable members to get to the chamber. The time is taken by a sand-glass on the table, and when it has elapsed the doors of the chamber are locked. It is at this particular juncture that it is essential that a member who desires to address the chair on a point of order should retain his seat and wear his hat. If he were to follow the ordinary practice, and stand up uncovered, he would be roared at and shouted at from all sides of the House for his breach of etiquette. Mr. Gladstone had occasion a few years ago to address the chair just as a division was about to be taken, and, forgetful of the rule for a moment, he rose to his feet. A shout of "Order! Order!" drawing his attention to his mistake, he sat down again; and as he never brought his hat into the chamber (an example which is followed by most ministers) he was obliged to put on the headgear of one of his lieutenants who sat on the bench beside him. Now, Mr. Gladstone's head was of an abnormal size. He had to get his own hats made to order. It is improbable that the hat of any other member in the House would have fitted him, but the hat available on the occasion of which I write only just covered his crown, and members made the rafters ring with laughter at his comical efforts to balance it on his head for the few

minutes he occupied in speaking from his seat on the front opposition bench.

An exception to the rule that a member must stand uncovered when addressing the House on all other occasions is made in cases of sickness or infirmity. The late Sir Charles Forster, who was member for Walsall, always addressed the House from his seat, in the later years of his Parliamentary life, owing to infirmity, and during the debate on the Home Rule Bill of 1893, in the House of Lords (in which chamber many of these rules of etiquette also apply), the late Marquis of Waterford, who had met with a bad mishap in the hunting field, spoke reclining on a bench and propped up with two air cushions which he had brought with him into the House.

Each sitting of the House opens, as I have said, with prayers, at the appointed hour, which is usually three o'clock, except on Wednesdays, when it is twelve o'clock. No business can be commenced except a quorum of forty is present, and members in attendance at prayers, and entering before a quorum is made up, are compelled by the sergeant-at-arms—who stands guard, a stern and unyielding sentinel, at the door—to remain in the chamber until a House is formed. On Wednesday, which is one of "the private members' days"—that is, a day for the discussion of bills introduced by unofficial members, as distinguished from government business—there is, occasionally, some difficulty and some delay in making a quorum. The time allowed for the purpose does not lapse till four o'clock. It is amusing to watch how, in the interval, a member approaching the chamber from the lobby will cautiously pause at the open portals, and seeing the state of affairs will send an ironical smile of sympathy to an imprisoned colleague, and, shutting his ears to the charming and seductive invitation of the sergeant-at-arms to step inside, will hastily withdraw again. "'Will you walk into my parlor?' said the spider to the fly," but it is only the new members that are

caught in the trap. One Wednesday, a few years ago—it was the first Derby Day for which the House refused to adjourn—no House was formed; but about thirty conscientious members who were present at prayers were detained in the chamber doing nothing for four hours, while the vast majority of their colleagues were playing truant, and enjoying unrestricted liberty on the breezy and sunlit downs of Epsom.

Once a House is made up and business commenced it proceeds uninterruptedly, even although there be only one member with the Speaker present. The Speaker himself can take no notice of the absence of a quorum. His attention must be directed to it. This is done by a member rising in his place and saying: "Mr. Speaker, I beg to call your attention to the fact that there are not forty members present." That being said, the Speaker must proceed to count the House. He does not, however, simply count the members who are present in the chamber at the moment. He rises and says: "Notice having been taken that there are not forty members present, strangers will withdraw," and then sets going the electric bells, which ring in every room of the vast building a summons to members to return to the House. The members come rushing in from all quarters, and after the lapse of two minutes the Speaker, using as a pointer his black beaver three-cornered hat (which, by the way, he never wears over his huge court wig), proceeds to count the number in the chamber. When he arrives at the fortieth member he cries out "Forty" in a loud voice, resumes his seat, and business again proceeds from the point at which it was interrupted by the motion for a count. But if there were not forty present, he would simply quit the chair without a word, and the sitting would be at an end.

In these days there is not much danger of the absentees running the risk of being made to stand the fire of the severe displeasure of the chair. But it was evidently different about the middle of the eighteenth

century. Lord Southampton (then Colonel Fitzroy) once fell under the censure of Mr. Speaker Onslow. He was acting as a lord-in-waiting, and entered the House just too late to complete a quorum. The Speaker, who had a very loud, hectoring voice and manner, severely admonished the honorable and gallant member, who excused himself by saying he had been "waiting upon his Majesty." Mr. Onslow at this thundered out: "Sir, don't tell me of waiting; this is your place to attend in — this is your first duty." Bold speaking, truly, for the days of George the Third.

It is a favorite device for a member who desires to secure an audience for a colleague to move "a count." The object, however, is not always attained. Members rush out again when the Speaker announces "Forty" and leave the benches as deserted as before. A few sessions ago, a London Radical member, who was to have resumed a debate when the Speaker returned after the usual brief adjournment, at 8:30 o'clock, found no one in the House but himself, the Speaker, and the clerks at the table. Not caring to talk to empty benches, he gravely called the attention of the Speaker to the obvious fact that there were not forty members present. The division bells rang out their summons as usual, but as only thirty-six members responded to the call, the unfortunate member instead of obtaining the audience he desired, had the sitting suspended, and, of course, lost his chance of making a speech.

There is on record a still more amusing story of a member who unintentionally "counted out" the House to his own confusion. He was not a particularly engaging speaker, so when he arose to "address the House" he had the entire chamber to himself. He opened ironically: "Mr. Speaker," he said, "look at the condition of these benches. Is it not disgraceful that the weighty topic on which I proposed to address the House has not attracted even the presence of a quorum?"

"Order! Order!" cried the Speaker. "Notice having been taken that there are not forty members present, strangers will withdraw." The member murmured curses not loud but deep on his unlucky expression of indignation. The bells rang out their summons, but no one answered. In another minute the Speaker disappeared behind the chair.

Another curious thing happened in the session of 1882. A division disclosed the fact that there were only twenty-five members in the House, which accordingly stood adjourned.

Formerly it was the custom for a member who moved a count to go covertly behind the chair and whisper in the Speaker's ear, "There are not forty members present," and then disappear through the doors which gave convenient access from the chamber immediately at the Speaker's back. The reporters never published the names of members who moved a count under these secret circumstances. The gentlemen of the press like an occasional "count out." It is a pleasant interruption of their arduous labors; and as a member who moved a count did not then care to have his name published, it was the rule of the Reporter's Gallery to suppress it for the encouragement of others. But for several years past there has been no secrecy in connection with the matter. Counts are now moved by members from their places. Two minutes, the same time as in the case of a division, is allowed to members to get to the chamber; but in order to distinguish a count from a division, the bells ring three times for a division and once only for a count, so that members who have no sympathy with the business under consideration need not trouble themselves to quit the reading-room, the smoking-room, or the dinner table in order to "make a House." The doors are not locked as in the case of a division, when the two minutes are up. Members, therefore, come in after the Speaker has begun counting. Oftentimes one man arriving

breathless in the nick of time saves the situation. Without him there would have been only thirty-nine members present, and the Speaker would have left the chair.

A speech can be interrupted at any moment, if there are not forty members present, by a motion to count the House. This leads occasionally to an amusing if not very edifying spectacle. Say it is a "private member's night"—that is, a night given over to the discussion of notices of motion. The government does not trouble about "keeping a House" on such a night. In fact, it is often their interest to have an awkward and troublesome motion by a private member quietly suppressed by a count-out. It therefore altogether depends on the interest of the motion on the paper, or on the popularity of the member in whose name it stands, whether or not a quorum is retained within the precincts of the House. But it invariably happens in the case of a motion of doubtful interest or importance, that a count is demanded by one of its opponents, perhaps just as the mover has begun his speech, but certainly after he has concluded. Immediately all the enemies of the motion clear out into the lobby, and try to persuade those who have turned up in reply to the summons of the bells to remain outside with them, instead of going into the chamber to help to "make the House." They crowd round the portals of the chamber, eagerly watching the Speaker, as he slowly—oh, with what exasperating slowness!—counts the members present. "One, two, . . . thirty-nine." With a cry of "Order! Order!" the Speaker has disappeared, to the great delight of the group in the lobby, the bitter vexation of spirit of the honorable gentleman in charge of the motion, and the utter bewilderment of the strangers in the galleries. The visitors on such a night are indeed deserving of commiseration. They had come to see the great House of Commons at work, and, lo! just after the Speaker resumed possession of the chair at nine o'clock, and the curtain was

rung up, the play was most inexplicably ended, and a moment afterwards they found themselves puzzled and disconsolate in Palace Yard.

If the House is in committee when a count is called and a quorum is not made up, an adjournment does not thereupon take place. The House can only be adjourned with the Speaker in the chair. The Speaker is, therefore, sent for, and the state of affairs having been reported to him by the chairman, he counts again. If forty members are not then present the adjournment takes place, but if a sufficient number of members to form a quorum have meantime arrived, the proceedings in committee are resumed.

The only occasion on which the Speaker can leave the chair without a motion to that effect being carried, is when a count has taken place. After midnight, when the "Orders of the Day" are gone through, a formal motion for the adjournment of the House is made by a minister. Until this is done the Speaker must remain in the chair. The same rule also applies in the House of Lords. On one occasion the minister in charge of the House forgot to make the usual motion, and left the Chamber with the other peers. But the lord chancellor could not follow their example. He had to remain on the woolsack while one of the doorkeepers went to bring back a peer to make the motion which would set his lordship free.

"Strangers will withdraw." This direction is always given by the Speaker when a division is challenged or a count moved. But all the same, strangers do not nowadays withdraw from the chamber. They still remain in the galleries above, and look down with interest on the progress of a division, or the strange proceedings which attend a count. Formerly, however, the chamber was entirely cleared of strangers during a count or a division. That custom originated in the days before the division lobbies were introduced, when the members were counted in the House (the numbers only being re-

corded), and when there was a possibility of strangers slipping into the chamber unnoticed and being reckoned by the tellers on one side or the other. One of the last divisions under the old system took place on the 19th of February, 1835, when the last Speaker chosen from the Conservative party, Mr. Manners Sutton, was driven by the Liberals from the chair to give place to Mr. Abercrombie. The scene is described by McCullagh Torrens in his "Life of Lord Melbourne." It came off in the temporary structure used by the House of Parliament, between the destruction of the old buildings by fire and the erection of the present palace of Westminster.

"The question was at length put by the clerk at the table, Mr. Fry, who, as bound" (writes Mr. Torrens) "in courtesy to the former Speaker, declared him to have the majority. The galleries were cleared, and the counting began. It was customary then for both sides to remain in their places and then to be reckoned by the tellers, who stood between them with their wands of office. The Ministerialists were declared to be three hundred and six, and already those about him congratulated Sutton on having manifestly won. Then came the reckoning for his opponent (Abercrombie). Except the Opposition whips, few felt sure that so great a number could be beaten, but when three hundred had been told, and some difficulty was found in seeing accurately into the last corner of the crowded gangway on the left, the suspense for the moment was breathless. 'Three hundred and five,' and then there was a slight pause. 'Three hundred and six'—a briefer pause—and then—'three hundred and seven' called forth such a cheer as wholly drowned the rest of the announcements, which went on until the final numbers were declared to be for Abercrombie, 'three hundred and sixteen'."

In the following year, 1836, the present system, by which members voting on different sides of a question walk through sepa-

rate division lobbies and have their names recorded, was introduced; but it was not till 1853 that the House came to the conclusion that strangers present in the galleries might be allowed to remain during a division without any embarrassment to the tellers. The Speaker's order, "Strangers will withdraw," is now only enforced in regard to visitors who occupy the two benches under the clock, which are level with the back benches of the House itself, whence it might be possible for a stranger, if allowed to remain, to pass into one of the division lobbies. But that he could be counted—even if he succeeded in getting into the lobby—is an utter impossibility, for the names of members voting are ticked off by division clerks as they pass through the lobby. Dr. Croke, the well-known Roman Catholic Archbishop of Cashel, once climbed over the low barrier which divides these seats from the House, and thus entered, unobserved by the sergeant-at-arms or his attendants, the sacred precincts of the chamber. Of course, Dr. Croke did not know at the moment of his breach of order. Mr. Parnell, who sat at the other side of the barrier, conversing with the archbishop, invited him to accompany him to the members' quarters, and his Grace, unaware that the proper way was out through the lobby, got over the barrier, before Mr. Parnell could stop him, and then quickly disappeared with the Irish leader through the side door giving access to one of the division lobbies.

The House, however, has the right to clear all the galleries, including the gallery in which the reporters work, and to go into secret session, with closed doors, when it pleases. Formerly, any member could at any time have the galleries cleared by simply rising in his place and saying, "Mr. Speaker, I espy strangers." But after a curious incident which occurred on the 27th of April, 1875, this autocratic power was very properly removed from the hands of the irresponsible private member. On that evening there

was a debate on a motion by Mr. Chaplin in relation to the breeding of horses. It attracted a brilliant sporting audience. The Prince of Wales was a prominent spectator in the royal seat over the clock. Suddenly the thread of Mr. Chaplin's discourse was severed by Mr. Joseph Biggar, the well-known Irish member, who, to the amazement of the crowded House, informed the Speaker that he espied strangers. Of course, all strangers were ordered out forthwith, and out the heir to the throne and representatives of "the Fourth Estate" had to go with the less distinguished occupants of the galleries. But the standing order regulating the admission of strangers was at once suspended on the motion of Mr. Disraeli, the then Leader of the House, and visitors and journalists were quickly readmitted. It was also enacted then that for the future the galleries should only be cleared on a motion regularly moved, and, if necessary, carried on a division, power however being reserved to the Speaker, or the chairman of committees, to order the withdrawal of strangers whenever he thought it necessary. That order has been put in force only once—in 1879—when on the motion of Colonel King Hanan, which was carried on a division, the galleries were cleared for four or five hours during a debate on the murder of Lord Leitrin in Ireland.

Members are not allowed to refer to each other by name in debate. The only member who is properly addressed by name is the chairman who presides over the deliberations of the House in committee. On a member rising to speak in committee he begins with "Mr. Lowther," and not with "Mr. Chairman," as at public meetings. When the Speaker is in the chair, the formula is "Mr. Speaker, Sir." In debate a member is distinguished by the office he holds, as "The Right Honorable Gentleman, the Chancellor of the Exchequer," or by the constituency he represents, as "The Honorable Gentleman, the Member for York." Some make use

of the terms, "My Honorable Friend," or "My Right Honorable Friend." In case of family relations the same form is usually observed. Occasionally "My Honorable Relative," or "My Right Honorable Relative," is heard, but "My Right Honorable Father," or "My Right Honorable Brother," though no doubt allowable, has not been hitherto used.

During the session of 1879, Mr. James Lowther, the chief secretary for Ireland, rose from his seat and was hurriedly leaving the House just as Mr. Lyman, an Irish representative, with a very loud voice, began to call attention to some Irish grievance. Another Irish member, thinking it strange that the chief secretary should leave the chamber when a question relating to Ireland was being brought forward, called out, "Hi, Hi! Lowther, where are you going?" And turning as he reached the door, Mr. Lowther coolly replied, "I'm going out on the terrace to hear Lyman." But the chair does not encourage these familiarities between members in the House.

The rule is in every case, when referring to a member, to use the words "Honorable" or "Right Honorable." This custom undoubtedly tends to keep the standard of debate on a high level of order, courtesy and dignity, but it has sometimes led to odd results. During the Parliament of 1886-92 two members were ignominiously expelled from the House after their conviction for gross immoral offences, and yet in the discussion that took place on each occasion the criminal was still punctiliously described as "The Honorable Gentleman." Again, lawyers are styled "Honorable and Learned," and officers of the army and navy "Honorable and Gallant." The late Mr. W. H. Smith, who was not a lawyer, was once referred to in a speech as "The Right Honorable and Learned Gentleman." "No, no!" exclaimed the simple old gentleman, not without a touch of humor, disclaiming the distinction amid the merriment of the House,

"I beg the honorable gentleman's pardon, I am not learned."

A member on his feet must, as I have said, address "Mr. Speaker." But, occasionally, one may hear some amusing slips of the tongue in the course of a debate. Members who have had a civic training in public life begin by apostrophizing "Mr. Mayor," and others who are largely in demand at public meetings by "Mr. Chairman, ladies and gentlemen." A good story went round the press recently, that an Irish member who had been called to order by the Speaker saluted that august personage as "Your Reverence." But it was an amusing case of mishearing on the part of the journalist in the press gallery. The member in question wrote to the newspapers that what he actually said was, "With all due deference to your ruling, Mr. Speaker."

As the Speaker and not the House generally is addressed, it is considered a breach of propriety for any one to pass between the chair and the member "in possession of the House." This violation of order is common for some time after the election of a new Parliament; but it is always punished with a loud and angry cry of "Order! Order!"—the cry that is most frequently heard in the House—which is very disconcerting to the blundering member against whom it is directed. A member, therefore, has often to get to his seat by a long, circuitous route. But if it be impossible to do this without crossing the line between the chair and the member addressing Mr. Speaker, he must wait until the speech is concluded, or if he cannot wait—if the getting to his place at once be imperative—he has to offer humble atonement for his act of impropriety by sacrificing his own native dignity of demeanor. He must cautiously and respectfully approach the sacred line, and then get over it quickly with a light step and a duck of the head or with his back lowly bent. He is fortunate if the cry of "Order! Order!" inspired by the

breach of etiquette, is not accompanied by ironical laughter at his grotesque antics.

It is a breach of order for a member to read a newspaper in the House. He may quote an extract from one in the course of a speech, but if he attempted to peruse it as he sat in his place his ears would soon be assailed by a stern and reproving cry of "Order! Order!" from the chair. Some members resort to the deception practised by the young lady who had "Vanity Fair" bound like a New Testament, and was observed reading it during service in St. Paul's Cathedral. Members often slip a newspaper or periodical into the "Orders of the Day," and read it while the Speaker imagines they are industriously studying the clause of a bill or its amendments.

The House of Lords is less strict, oddly enough, in little matters of this kind than the House of Commons. The peers allow the attendants to pass up and down their chamber delivering messages, and they have a reporter—the representative of the Parliamentary debates—sitting with the clerks at the table. But in the House of Commons the clerks at the table, and the sergeant-at-arms and his deputy, are the only officers of the House who are allowed within the technical limits or boundaries of the legislative chamber, or, in other words, across the Bar, while the House is sitting. An attendant, even when he has letters and telegrams to deliver, dare not pass beyond the line of the Bar. He gives the messages to some member sitting near the Bar, and they are passed on from hand to hand till they reach the members to whom they are addressed.

Every member is under a constitutional obligation to attend the service of the House. The attendance, however, is not now compulsory. The House, probably, considers the force of public opinion in the constituencies sufficient to correct any laxity on the part of any members in the discharge of their Parliamentary duties. But there is an old

procedure known as "a call of the House," for taking the full sense of the House on any question of great importance. Not less than a week or ten days is allowed to members to respond to the call, and any member not present in the House to answer to his name when the roll is read by the clerk, without due cause for his absence, may be sent for in the custody of the sergeant-at-arms. This procedure would now be resorted to only on the occasion of some supreme crisis in the affairs of the nation, when it was most essential that every member of Parliament should be at his post. The last time "a call of the House" was made was on the 19th of April, 1876, on the motion of Mr. Whittle Harvey, who subsequently moved for the appointment of a select committee to revise the pension list. The division on the latter motion (which was rejected by a majority of one hundred and twenty-two) showed that there were four hundred and fourteen members in the House. The last occasion on which a motion for "a call" was moved was on the 23d of March, 1882, when Mr. Sexton, in accordance with notice moved "that this House be called over on Thursday, the 30th of March." The House on that day was to enter on the consideration of the proposed new rules of procedure (including the closure of debate), and Mr. Sexton's object was to secure the attendance of Messrs. Parnell, Dillon and O'Kelly, M. P.'s, who were at the time confined as "suspects" in Kilmainham Prison, Dublin. The motion, which was opposed by the government, was defeated. It was pointed out that the procedure was useless for the purpose for which it was originally intended—namely, to take the full sense of the House on a bill or motion, as there is no compulsory process in the procedure of the House by which members, even if they answered the "call," can be obliged to vote on the question at issue. The "call" to which members are most alive, nowadays, is the crack of the party whip.

That absenteeism was a dire offence in

the time of the Stuart Kings is proved by the number and variety of "orders touching motion for leave into the country" to be found in the journals during the seventeenth century. Here are a few of them: "13th of February, 1620. No member shall go out of town without open motion and license in the House." By the next rule it will be seen that knights of the shire were ranked much higher than the representatives of cities or boroughs: "25th of March, 1664. The penalty of 10*l.* to be paid by every knight, and 5*l.* by every citizen, etc., who shall make default in attending." Absence evidently became a crying sin, and was visited accordingly: "16th of November, 1666. To be sent for in custody of the sergeant." From the succeeding string of resolutions it is evident that, under the restored monarchy, there was a marked inclination amongst members to "play the truant": "18th of December, 1666. Such members of the House as depart into the country without leave, to be sent for in custody of the sergeant-at-arms." Even this terror does not seem to have effectually deterred "runaways," for two months later marks the imposition of a penalty which, in those days, must have seemed formidable indeed: "13th of February, 1667. That every defaulter in attendance, whose excuse shall not be allowed this day, be fined the sum of 40*l.* and sent for in custody, and committed to the Tower till the fine be paid." A similar fine was, at the same time, imposed on "every member who should desert the service of the House for the space of three days," without special leave, incarceration in the Tower being part of the penalty. The stringency of this rule was relaxed by common consent in 1668, and a fine of 10*l.* was substituted as sufficiently onerous, in all cases "the fines to be paid into the hands of the sergeant-at-arms, to be disposed of as the House shall direct."

The individual freedom of members in our times is not so much restricted, but that absenteeism is still an offence is proved by the

fact that occasionally the "Orders of the Day" contain a notice, such as the following, in the name of one of the Whips :

"MR. T. ELLIS.

"To move that leave of absence for two months be granted to Mr. J. R. Flemming."

Such motions are made by the Whips on behalf of a follower who desires to absent himself from the House of Commons on the ground of urgent business, ill-health, illness in his family or domestic affliction, and the leave of absence applied for is always granted by the House. This, however, is only done when the member concerned is serving on a committee.

A member of the House of Commons cannot, according to the ancient law of Parliament, resign his seat. Once he is duly elected he must retain the trust confided in him by his constituents till the dissolution of Parliament, unless he is removed by death or becomes a bankrupt or a lunatic, or is expelled from the House, or accepts an office of honor or profit under the Crown. The latter condition, however, affords a practical, though rather ludicrous, means of escape for a member who desires to rid himself of his representative and legislature responsibilities. He accepts the office of "Steward of the Chiltern Hundreds." It seems that centuries ago the Chiltern Hills—a portion of the high lands of Buckinghamshire—being covered with timber, afforded protection to numerous banditti, and it was the duty of the Steward of the Chiltern Hundreds to protect the inhabitants of the neighboring districts from their depredations. The du-

ties have, of course, long since ceased, but the nominal office has been retained. By accepting it a member who wishes to resign vacates his seat, and a writ for a new election is, in consequence, issued on the application of the Whip of the party to which the retiring member belonged. The office is resigned as soon as the purpose in view is accomplished. It is in the gift of the chancellor of the exchequer. It cannot be conferred twice in one day, but there are two other offices of a similar nature—"Steward of the Manors of Hendred, Northstead and Hemp-holme," and "Escheator of Munster"—at the disposal of the chancellor of the exchequer in case he should receive more than one application on the same day.

But there is nothing more amusing perhaps in all the quaint and curious customs of the House of Commons than the strange ceremony which marks the termination of its every sitting. The moment the House is adjourned, stentorian-voiced messengers and policemen cry out in the lobbies and corridors, "Who goes home?" These mysterious words have sounded every night for centuries through the palace of Westminster. The custom dates from a time when it was necessary for members to go home in parties accompanied by links-men for common protection against the footpads who infested the streets of London. But though that danger has long since passed away, the question "Who goes home?" is still asked, night after night, during the session of Parliament. No reply is given, and none is expected.

MICHAEL MACDONAGH,
in the Nineteenth Century.



A VIKING LAWSUIT.

BY SAMUEL SCOVILLE.

THE technicalities of legal procedure seem almost incongruous in connection with the untamed Vikings, who harried the world from "West-over-the-Sea," their name for England, even to "Micklegarth," or Constantinople. Yet these men whose fierce blood flows through our veins in "the dull grey dark" of their frozen North, established precedent and practice which to-day are part of the framework of our great common law. A typical Viking lawsuit, the translation of which follows, is the blood-suit of Asmund the Greyhaired, as chronicled in one of their Sagas, and it is interesting to note what few changes nine hundred years have wrought in the procedure of our ancestors, the Men of the Northlands.

Asmund the Greyhaired lived at Biarg and was one of the greatest of bonders in the Midfirth. At Asmund's grew up a man called Thorgils, near akin to Asmund. Asmund bought for Thorgils land at Brookmeet and there he farmed. Thorgils was a great store-gatherer and went a-searching to the beaches every year, and there he got for himself whales and other gettings. It chanced one summer that Thorgils found a whale on common tide-land and forthwith he and his folk set about cutting it up. This came to the ears of two foster brothers, Thorgeir and Thorwold, of Westfirth, who owned a boat and were rovers and moreover not men of even dealing. They went down to the beaches and laid claim to the whale as lying on common tide land. Thorgils offered that they should have one half of the uncut part, but they would have for themselves all the uncut or else divide all into halves, both the cut and the uncut. Thorgils flatly refused to give up what was cut of the whale and therewith words waxed hot between them and of a sudden both sides caught up their weapons. The end was that both Thorgils and certain of his men were slain, being outnumbered.

Asmund the Greyhaired heard of this slaying

of his kinsman and took on himself the blood-suit therefor, had witnesses to the wounds and summoned the case before the Althing, that then seeming to be the law, since the brothers lived in Westfirth and Thorgils in Midfirth. There was another kinsman to dead-man Thorgils, named Thorstein, a great champion and the wildest-tempered of men. Him Asmund joined as suitor in the case along with himself. At once he went to meet his kinsman, Asmund, and they talked the blood-suit over together. Thorstein was mightily wroth and said that no atonement should be for this and that they had strength of kin enough to bring about for the slaying, either outlawry or vengeance on the men. Asmund said that he would follow him in whatsoever he would have done, and they sent word to all the other of their kin, and gathered together six tens of men.

Now the brothers had a kinsman, Arison, who dwelt at Reek-knolls in the Westfirth and was a man of great bountifulness. After the slaying of Thorgils the brothers went to him for harbor, and he agreed to go to the Althing for them. In the autumn Arison sent a man to Thorstein and bid were-gild and tried to settle the case outside of the Althing, but Thorstein was cross-grained to deal with and refused were-gild. Then Arison placed the brothers secretly on board a ship up Northriver near Burgfirth. Thereafter all men, save those who chanced to be away warring, rode to the Althing. There Arison offered were-gild for the slaying, if thereby the brothers might be quit of guilt. Asmund the Greyhaired and Thorstein refused were-gild. Then for another defence Arison put forth whether all men had not free catch on all common foreshores. Asmund the Greyhaired challenged this defence, and the Lawman was asked if this was a lawful defence. Skapti was the Lawman and said the defence was good if they were equal men, but this was the law that bonders had a right to take before bachelors. Asmund said further that Thorgils had offered an even sharing to the foster brothers in so much of the whale as was uncut when they came

thereto. Therewith that way of defence was closed against the brothers. Then Asmund and his kin followed up the suit with much eagerness, and nought was good to them but that the brothers should be made guilty. Arison saw that one of two things was to be done, either to set on with many men, not knowing what might be gained thereby, or to suffer things to go on as they might; and whereas the brothers were safe on board ship Arison let the suit go unheeded.

Thorgeir was outlawed, but for the other brother was taken were-gild and he was quit. By this blood-suit Asmund the Greyhaired and Thorstein his kinsman were deemed of men to have waxed much.

But when Thorgeir heard of his outlawry he said:

"Fain am I that those who have made me an outlaw shall have full pay ere all be over."

So ends the story of this old-time trial, and though the law of the strong-arm still obtained, as where Thorstein naively remarks that the plaintiffs can muster enough strength of kin to obtain judgment in their favor, yet much of our modern procedure is foreshadowed in this suit of our grim forefathers. The venue of the action was Iceland, which had been then only recently settled by Vikings, fleeing from the might of Harold the Fairhaired, then conquering and Christianizing Norway, all for the love of a maiden who had flouted him. As alternative to a "blood-suit," was the "blood-feud," by virtue of which the kinsman of a murdered man would slay the murderer summarily and begin a vendetta which would last until one family or the other was wiped out. But Asmund, as a law-abiding citizen, preferred the legal method by which the accused, if found guilty, were condemned to outlawry and could be lawfully killed at sight, if the kin of the murdered man refused to take "were-gild" or blood-money for his death. The trouble first began in a dispute over a species of wreck, in which the murdered man's position was clearly the legal one. *En passant* may be noted the quaint law in re-

gard to stranded whales that afterwards obtained in England in the reign of Edward the Second, and which, as far as the writer has been able to discover, has never been repealed. As reported by Fleta, it reads as follows:

Also the King has wreck of the sea throughout the whole realm, whales and sturgeons taken in the sea or elsewhere. Of the sturgeon it is the rule that the King shall have the whole of it. But of the whale it is enough if the King has the head and the Queen the tail.

The suit was commenced in the conventional way by Asmund, a kinsman of Thorgils, who first summoned witnesses to the wounds. By these witnesses, in order to make out a *prima facie* case, it was necessary to prove the wrongful infliction of the wounds by the defendants and the death of the decedent. It will be observed that this differs in no respect from the modern rules of evidence in regard to the *corpus delicti* now in force in most of our states, viz., the establishing by direct testimony of the death and the commission of a wrongful act by the defendant.

The case was one outside of the local jurisdiction of the Thing, or town-meeting, one party residing in the middle district or Mid-firth, the other in the western district or West-firth. The suit was accordingly brought in the Althing, or state-meeting, which had a jurisdiction resembling that of the Federal Courts over residents of different districts.

Having taken these necessary preliminary steps, Asmund astutely joined the most warlike of Thorgils' remaining kinsmen with him as a co-plaintiff to be prepared in case the defendants resorted to arms.

In the mean time the latter obtained as attorney, Arison, the most powerful of their kin. In Viking days there was no profession of law in the modern sense and a man acted as attorney for another purely as a labor of love or duty. Arison's first step, as befitted a prudent attorney, was to attempt to settle

the case out of court. To this end he sent to Thorstein, the most implacable of the plaintiffs, and offered blood-money. This having been refused, he proceeded to take precautions against an adverse judgment quite in accordance with modern methods. As the defendants were not required to appear in person, Arison wisely discounted the future by placing them secretly on a ship bound to Norway. With this anchor to windward he serenely proceeded to court prepared to make the best of a bad case. Before the Althing we may assume the plaintiffs made out a *prima facie* case, although these facts are not brought out in the chronicle. Arison opened the defense by offering in open court to pay blood-money. This offer having been again refused he proceeded to his defence proper which, although now it would only be admissible in mitigation of damages, was then a complete answer to the charge if only it could be established. This defence in brief consisted in proving that all men had equal rights in wreckage found on tide-water lands and that thus the decedent had brought his death on himself by refusing to recognize an established public privilege. It was a crafty move and one well calculated to appeal to popular prejudice, but Asmund the Greyhaired, demurred to this defence by showing that this law only applied to landholders and that between a bonder such as Thorgils and landless men like the accused, the rights of the former were paramount. He next traversed Arison's defence by proving affirmatively that the murdered man had even offered the accused an equal share in the uncut portion of the whale. This last evidently unexpected testi-

mony deprived the defendants of their last hope of success. For a moment Arison meditated a desperate attack on bench and bar alike, a *coup de main* which came very natural to a Viking advocate, but the cheering thought that after all the defendants were safe for the present and the restraining influence of "six tens" of kinsmen that Asmund had thoughtfully brought to court, combined to convince him that such practice would be irregular. The decision of the court was that for the younger of the brother blood-money should be taken, but that Thorgeir, the elder, should be outlawed. By this doom he became the prey of any man who could and would slay him, either for the reward that the kin of the dead man would probably offer or simply as a matter of public policy that encouraged the killing of wolves and outlaws. At any time during his outlawry if the kinsmen of the dead man consented to take blood-money he could again become a free man, so, too, if he survived the ban for the space of twenty years. There is no record, however, among the Sagas of any outlaw who ever regained his franchise by the latter method, so public-spirited were the Vikings in all matters of killing, and even Grettir, the Strong, most famous of Icelandic outlaws, was slain in the nineteenth year of his outlawry.

It is a matter of regret that Thorgeir did not receive the news of his sentence with the respect due a decision of the Althing, and his grim remark that he would pay in full those who had brought about his outlawry, foreshadowed the vengeance that he afterwards wrought on the blood of Asmund.



THE LAW OF THE LAND.

XIV.

DEBTS OF HONOR.

BY WM. ARCH. McCLEAN.

LANGUAGE has many words and expressions possessing a twofold meaning, the one a mockery of the other. A spade is a spade when it is in the hands of an honest laborer at the rate of a dollar a day for the use made of it in building the highways of the world. Again, a spade is a spade when it may be ace high in either a royal or a bobtail flush in a game in which the only right of recovery of the winner will be in what is another mockery in terms—a court of honor.

The world's phraseology in speaking of this court is necessarily peculiar. It is supposed to be convened in session for the protection of the rights of gentlemen only. It is supposed to owe its existence to a very fine appreciation upon the part of gentlemen only of what honor is. It is a high culture reached by gentlemen only. Ordinary honest men, who pay cash down for every equivalent and who are born American kickers against paying bills for which no equivalent has been received, are too commonplace to understand the technicalities of this court. They lack the appreciation of the nice distinctions of a gentleman's life.

The peculiar character of this fine-grained article that makes up the life of a gentleman and his sense of honor is well illustrated by a remark, often gratuitously donated to a deluded people, that the best study of mankind is that gained at a gaming table; that a gentleman never knows his man as well as on the other side of a gaming table, and that the debts of honor there liquidated are a cheap outlay for the culture received. Cheap is hardly the word, however, in which any-

thing is to be qualified about such ways of such gentlemen.

The culture of knowing your man is almost as wonderful as to know thyself, and the many specious reasons self will use to convince self the way self wants to be convinced. The culture of knowing men has much to do with driving the world along, and its countless industries and great organizations, which feed, clothe and give employment to the inhabitants thereof. In all the great affairs of life it is of incalculable advantage to know an honest, reliable man. By a finesse of reason it is of course conceivable that this knowledge can grow out of the art and culture of knowing the difference between a gentleman, possessing a sense of honor in playing only the cards dealt him and paying his debts of honor, and a black-leg on the opposite side of the gaming table.

It is often reasoned by those possessing this higher appreciation of the nice distinctions of the culture of a gentleman's life, that there is always an equivalent, a value received in the I O U's of debts of honor. Courts of law in many cases of damages recognize pain, mental anguish and suffering as an element for which it is possible to base a recovery. It is true that gentlemen who contract debts of honor are given, by way of consideration, all kinds of mental conditions, from the joy and hilarity of winning to the peculiar kind of anguish each one experiences in his own way upon losing. Along the same line of finesse reasoning, such ought to be sufficient consideration, together with the spice and fun of the game, to make of force and effect all debts of honor, if not in courts of law, at

least in courts of honor. It were perhaps an invidious distinction to say that the winner is paid for having his joy and hilarity, while the one who suffers the anguish must pay his debt of honor, so that the joy of the other may remain unabated.

Debts of honor follow mankind through life. They begin early in life with "come seven, come eleven." Then later it is a penny ante with a five cent limit, and the limit gradually grows until there is no limit or it becomes only a question of the size of your pile. By and by the gauntlet is run of bucking the tiger in his den at faro, roulette and every other kind of a game that goes. Betting on elections, buying pools at horse races and policy shops and indulging in all kinds of lotteries follow. When these things out of which debts of honor grow become indigenious to the soil, everything goes. You play to win the cigars you smoke, the drinks you drink, and all the other luxuries, as well as many of the necessities of life you must have. You finally reach a stage where you will kill off minutes and money upon the color of the hair of the girl or horse that next passes within range of your sight.

The education of the gentleman is, however, not complete until he takes a plunge into the society where all the great ones of his class live, move and have their being. He must learn, in order to be ultra, what a future is, what a margin is, or what fun there is in selling short, and other nice points of the great game.

When the education of a gentleman is complete he ought to be a marvel of culture, and usually is if it has landed him on his uppers. If he does not find himself in that condition he does discover that he is very little further ahead of the game than after his first experiences with "come seven, come eleven."

The puritanical may call all such beings as we have been talking about, gamblers. It is unbecoming, however, among gentlemen, as showing lack of culture and breeding, to call

names, for all gamblers are gentlemen unless they are blacklegs. One cannot be a gentleman and play with a card up his sleeve, or with loaded die, or enter a horse with a record under an assumed name in a lowerclass race, or do any other trick of the trade, unless, perhaps, the others in the game are all at the same tricks; then they are all gentlemen blacklegs together. Usually a blackleg is a blackleg when he is caught stealing. The offense consists in being caught. Among gentlemen such a one sometimes gets his reward. In one state of civilization he loses his caste, even if he has a title, if he is caught at bacarat. In another western civilization he loses more if the mark is not missed, which is a poor thing to bet upon its doing.

It is curious that the law of the land is brutal in its language when applied to debts of honor and the transactions out of which they grow. This is rather remarkable in the face of the popular belief that lawyers and judges in their leisure moments do amuse themselves with games of chance played with pieces of pasteboards adorned with symbolical hieroglyphics. Either the public is possessed of mistaken views as to the profession or the profession is broad enough to

See the right and approve it, too,
Condemn the wrong, and yet the wrong pursue.

One court, in speaking of debts of honor, declared the law of the land in relation thereto, saying that a band of robbers might plead a similar sense of honor. This sense of honor, when founded on a transgression of law and upheld in order that law may be prostrated, is a vice of the most dangerous character. A sense of honor may actuate even unlawful deeds, but it cannot long endure such association without being seriously trampled and finally effaced. This is exceedingly strong language to use about the affairs of gentlemen. But as the court of honor in which all debts of honor are liquidated is beyond the law, it makes no odds if the law does declare all gambling transactions con-

trary to good morals and public policy, for if the debts of honor are not paid, because legally void, the debtor is no gentleman, for all gentlemen pay their debts of honor.

Courts have very little trouble in dealing with the lesser games of chance, many of which have been declared statutory misdemeanors. Debts created by betting on horse races, elections and the like are declared void as often as courts are given the chance to do so. Where a party playing at a faro table gives a note in exchange for checks or counters used at the gaming table and afterwards loses the checks at the game, the note is void. Or where a promissory note is given in a gambling transaction such as a drawing of tickets, it is void.

It has been held not only that all such debts of honor, whether I O U's promissory notes, judgments and mortgages, are void in the hands of the original holder if the consideration was a gambling wager, as being contrary to good morals and public policy. But courts have also gone further and held that no obligation based upon a gambling wager is good at any time. That the defence of the gambling wager can be made at any time and as against any holder of the obligation. That the note for checks or counters at a faro table is void even if it comes into the hands of an innocent holder for value. Or as declared broadly by one Court, negotiable paper in the hands of an innocent holder for value before maturity, for a gambling wager, is void. There are States, however, where innocent holders for value before maturity are protected unless such paper is declared void by the peremptory words of a statute. The tendency, however, is not to protect the innocent holders of paper based upon gambling wagers. If this was not so, it might be the easiest thing in the world for gentlemen to make their debts of honor common ordinary legal obligations. A gentleman broker, or shaver, or fence, would always be on hand as the accommodating innocent holder.

Courts do not look with favor upon the encouragement gentlemen give each other in the matter of these debts of honor. It is not the one who is led into temptation that then suffers the most, but he who tempted. It has been ruled that where one knowingly and with the purpose of furthering a gambling transaction lends money to another, it cannot be recovered. Where one who stands by the gaming table and sees a gentleman brother gradually go broken and volunteers to lend him more money upon an obligation to enable him to continue in the game, the obligation is as void as though given direct to the banker in the game. It is unlawful for a man to play, hence it is unlawful for another to knowingly furnish him the means to play.

It is never too late to get your money back in these games provided it is still in the hands of the stakeholder. Where money is staked on the result of a wager and remains in the hands of the broker, it belongs to the person from whom it came and it may be withdrawn by him, notwithstanding the loss of the bet, and without the consent of the other party. Or money bet on an election and deposited with a stakeholder, who after the event of the election is known, has notice not to pay it over to the winner, may be recovered back by the loser. An action lies against a stakeholder for the money bet on the speed of a horse, where the stakeholder has not paid it over, or where he has paid it to the other party after notice not to do so. All this admonishes the stakeholders to get rid of the moneys as soon after the results as they can, before they receive notice or be sued, and this advice is specially pertinent in a presidential year.

There is a case that presents certain peculiar points. At a meeting it was agreed, in preparation for a squirrel hunt, that the beaten party should pay for the supper of the other. The captain of each party engaged the plaintiff to furnish the supper, and the plaintiff presided at the meeting and understood and

knew how the supper was to be paid for. The defence was that the supper was a wagering contract and plaintiff could not recover. From one point of view it might appear that the captains bet the supper on the wager of the success or failure of the hunt. From another both parties must have been poor marksmen and the result of the hunt was going to depend upon dumb luck and not skill, otherwise it would have been held to be a game of skill and not chance. The court considered the situation from still another point of view. The landlord was not to gain or lose by the success or the defeat of either party. The supper was to be ready in any contingency. They might eat the supper or give it to the dogs. They were to receive so much food absolutely and at all costs and it was to be furnished for a consideration, hence the plaintiff was entitled to recover from defendant the cost of the supper for the whole party. It must have been a poor sort of a crowd, or a poor hunt, or the supper must have been awful poor, that gentlemen would dispute about the paying of same.

The wagering contracts we have been speaking of have been the simpler ones, the determination of which do not seem to have given the courts much trouble. The law of the land has been against the gentlemen trying to do business beyond the courts of honor specially designed by them for the recovery of their contracts. When it comes to gambling transactions of the stock market the questions to be determined by the courts are more difficult and intricate and call for many nice distinctions. The underlying principle seems simple enough that a purchase of shares of stock or commodities without the intention to deliver or receive them is a gaming contract, and such a wager as is not enforceable at law. The inventive genius of our exchanges, however, continually create new situations of putting the old gaming wine into new bottles, so that the law of the

land must be resorted to, to label the new concoction.

The language of the street is largely symbolic. Dealings in futures suggest a riddle of the Sphinx. Futures being, however, contracts of sale to be delivered in the future, courts declare them to be all right if there is a *bona fide* intention to deliver, and all wrong without such intention. A put, a call, a straddle and a sale short, smack of that lingo that tells of an ante, a straddle, a raise, a call and a bluff. A put is the privilege of delivering or not delivering the thing sold, and resembles a dropping out on a poor hand or a raise on a full hand, and is a wager or gambling contract always. A call is the privilege of calling or not calling for the delivery of the thing bought, and is suggestive of a call to show hands and is a wager always, being contrary to good morals and public policy. A straddle, or double privilege of a put and a call, secures to the holder the right to buy or sell to another something within a certain time at a certain price. If it is an attempt to cover losses by betting you will lose where you had previously bet you would win and no delivery is contemplated, it is a wager. If, however, it means no more than an option which may be completed by actual and intended delivery, it is not necessarily void. A sale short is more or less of a bluff, for it is a sale of that which the seller does not own or possess, but which he expects to buy in at a lower price than that for which he sells. Courts declare selling short is not *ipso facto* a wager, for the element of delivery may have been intended and contemplated at all times and at all hazards. If so, it is legal; if not, it is a gamble.

A unique invention of the street has been margin. How other games of chance have existed in the same civilization with it is wonderful, for it is ridiculous to conceive of gentlemen indulging in games of chance requiring chips of a certain face value when

they can do business on the street on the percentage of a face value. Margin is a simon-pure wager on the rise or fall of the market. It is legally recognized that stocks and commodities can be bought on credit and that the credit may be for the whole price or for a part of it, with or without security. Margin is security and as long as there is an intention to buy and deliver, it will be recognized legally as security, but where there is no intention to deliver, dealings on margin are gambling transactions void *ab initio*.

When lambs are to be sheared it is to be observed that there are to be no infants among them. It has been held that where a minor embarks in stock transactions by way of margin it is a wagering contract merely, contrary to the policy of the law and void *ab initio*. Where the amount is lost he is at liberty to recover back from the broker employed the amount so deposited. Thus the law throws its protecting arm around the period of sowing wild oats. The doctrine, that where an infant has executed a contract and seeks to avoid it on coming of age, he must first restore the consideration he has received, has no application in a case of a gambling transaction void from the beginning. This is nothing more nor less than notice to the gentlemen of the courts of honor to play their games with gentlemen of their own age and size, and when they must go into the shearing business to confine themselves to the sheep and to leave the lambs of tender years go unshorn.

No matter what the form of a contract is it will not control courts in the determination of the same, for gentlemen and black-legs are astute in concealing their intentions. It is the real nature of the transaction which courts seek to discover. The law of the land regards the substance and not the shadow and if parties intended that the purchaser should pay for and the seller deliver the commodity or stock at the maturity of the contract, payment of margins does not

vitiates. A gambling transaction is one to be settled and adjusted by payment of difference in price. If price should decline, the purchaser paying the difference, if it should rise the seller paying the advance. Margin deposited upon such an illegal transaction cannot be recovered back, and money knowingly lent for the express purpose of enabling the borrower to settle stock jobbing losses cannot be recovered, the transactions being void between the parties.

That it is the substance that controls the application of the law of the land is illustrated by the cases. If one of the parties intended an actual purchase and sale, the contract as to him will not be effected by an illegal intent or purpose of the other not communicated or concurred in. Both parties must intend it to be a wager to make it so. Where a contract is made upon a valid basis but it is settled on a gambling one and the settlement involved an exchange of obligations, the gamble may be set up as a good defence against the obligations. Where a stock broker and a customer engage in a series of wagering transactions in a particular stock which amount to gambling and the customer finally demands a delivery of the stock and the broker agrees thereto, the customer is liable to the broker for the price of the stock and his contract is not rendered invalid by his previous wagering transactions with the broker.

If it is the intention of the parties that an actual purchase of stock on margin shall be made by a broker, the transaction is legal although the delivery may be postponed or made to depend upon a future condition. But if the fact is that no delivery is contemplated to complete the purchase, and the account is to be settled on the basis of a rise or fall in prices, it is a mere wager, and the contract cannot be enforced by either party.

Where the contract of a broker, with those from whom he bought, under the rules of the Board of Trade, was such that the delivery of the goods was contemplated and could

have been demanded when the time of delivery arrived, that he made daily settlements for his purchases and sales in accordance with the rules, that the fact of non-delivery resulted by reason of the client ordering the sale before the time of delivery came around, it was held not to be a wagering contract and a note given in the deal was good.

Where a broker bought stock on an order, paid for it and took the delivery of it and asked purchaser to take the stock, although there might have been times when the stock was not in his name, yet was in possession of the broker at the time he requested purchaser to take it, it does not lie in the mouth of the principal to say agent could not deliver when he never offered payment or demanded delivery, hence the broker could recover the money advanced in the purchases.

When stocks are bought and sold, although upon speculation, if they are to be delivered it is not a gambling transaction. One not owning stock employed a broker to sell stock for him at a named price, to be delivered upon a particular day. The stock was sold and at the time of delivery, prices having risen, the broker borrowed stocks to meet the engagement. He afterwards, under instructions, bought at a higher rate to replace the stock borrowed and the transaction was held to be a legitimate one and that the customer was liable to the broker for the difference. In another case where the circumstances were identical, but no delivery was provided or intended and the settlement was to be upon the rise or fall of the market, it was held to be a gambling contract and void.

In a deal where stocks were in every instance actually sold and delivered and the broker was not aware that his customer was selling short until the time of credit was expiring and he bought to fill his sales, the Court ruled it will not do to say because there is so much gambling in stocks that every sale short is *ipso facto* a wager, and compelled

the short customer to stand good to the transaction.

Where the broker with client's money bought shares of stock and received and retained the certificate thereof until at the request of client they were sold and the proceeds of the sale were retained and used in part payment of other stock purchased in same way at client's request, and these purchases and sales of stock continued until the client was in broker's debt, for which debt a judgment note was given, the note was held not to be a debt of honor, but a good legal debt collectible by process of law.

Loans and advances by brokers cannot always be collected, for the chances are the courts will look upon the broker as a middleman and hold that one who knowingly and with the purpose of furthering a gambling transaction in purchasing commodities, stock, grain or oil on margin, lends money to another, cannot recover it. It being unlawful for one man to pay, it cannot be lawful for another to furnish him the means of paying. The creditor, however, must have known that the borrower was purposing such use of the loan and must have been complicated as a confederate in the transaction, though such confederacy does not necessarily contemplate sharing the gains and losses.

A word about corners. An agreement to make a corner in stock by buying it up so as to control the market and then purchase for future delivery and compel all the sellers to buy of them to make good their sales has been judicially determined to be a void contract.

A case of much interest was that where it appeared the client deposited a sum of money with broker to be devoted at broker's discretion to speculation in stock for the benefit and at the risk of the owner, and the money was applied in the way intended in the utmost good faith, but the speculations were unsuccessful and the money was lost. The broker, however, did not communicate to his principal the facts of the loss, but sought to

retrieve it by using his own money in other speculations for that purpose and remitted to principal a large amount and allowed the principal to regard the same as proceeds of investment of latter's money. It was held that the conduct of the agent broker did not estop him from showing the truth as to the condition of the account with the principal. The position of the principal was in no ways prejudiced by agent's conduct. The money was gone and the agent's stricken conscience could not bring it back nor make the agent responsible for the loss.

The time comes in all games when the players want to play quits. There is a quitting before the gambling transactions are settled, when all debts of honor may be repudiated, which if done will ostracize you for all time to come from the society of gentlemen we have been speaking of. Or there may be a settlement and quitting afterwards. Gentlemen love those who never squeal, who will lose all they have in the world and then go out and shoot themselves rather than peach or repudiate their debts of honor. It has been held that where the profits of a gambling operation have been paid over by the broker to his customer and accounts are settled but the amount of the original margin is left in the hands of the broker for future operations, the customer may recover the margin on an action against the broker and the latter cannot set up the illegal character of the previous transaction in defence thereto.

Debts of honor have all the legal protection that is thrown around criminals. A thief is presumed to be innocent and the burden of proving guilt beyond a reasonable

doubt is upon the people. So the burden of proof of establishing the illegality of a gambling transaction rests upon the party who asserts it and that construction is to be preferred which will support the contract rather than the one which will avoid it. The part juries take in these questions is the guessing, guessing whether or not they are wagering contracts.

The pay of the piper, or in other words, the commission of the broker, is a very uncertain element in stock gambling transactions. It is true that a broker might negotiate a gambling contract without being privy to the illegal intent of the principal parties to it, at least a certain judge was of this opinion, and in such a case being innocent of any violation of law and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. When, however, the broker is privy to the unlawful design of the parties and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis* and cannot recover for services rendered or losses incurred by himself or on behalf of either of the parties to it in forwarding the transaction.

When the difficulties of stock gambling are considered one marvels at the chances taken, for every margin put up as margin is beyond recovery. You have to place absolute faith in your broker, put up new margins as frequently as he wires for them and when you come out ahead of the game, it is well to thank your stars that you fell into company possessing that queer sense of honor that enters into debts of honor.

THE BAR OF EARLY MARYLAND.

BY ELIHU S. RILEY OF THE MARYLAND BAR.

JOHN LEWGER was the father of the Maryland Bar. He it was who appeared first, with brief in hand, before the Provincial Court; he it was who stood first at the bar of justice to demand the rights of another; he it was who filed the first declaration that called on

Maryland law to vindicate the cause of the aggrieved according to the very right and equity of the matter. As Attorney of the Lord Proprietary, John Lewger, on the 30th day of December, 1637, (old style), filed his narr. in the first Provincial Court that met in Maryland, reciting that "Captain Henry Fleete, of St. George's Hundred, planter, was indebted to the Lord Proprietary in the sum of one hundred pounds of beaver fures that he had

borrowed from him as a joint adventurer in the trade of beavers with the Indians, and hath not yet paid, although he hath been often requested to pay the same by the Honorable Leonard Calvert, Esq., Lieutenant General of this Province, on behalf of the said Lord Proprietary."

This Court was held at the old town of St. Mary's on the St. Mary's River, then the capital of Maryland. John Lewger arrived in the Province, November 28, 1637, ac-

companied by his wife and son. Mr. Lewger imported with him three maid servants and three men servants and, during the year, brought seventeen persons into the Province. Of him, Mr. Bozman, one of Maryland's historians, says: "He was a man above the ordi-

nary rank in society, both as to fortune and mental qualifications."

Mr. Lewger, while he was Attorney General of the Lord Proprietary, was one of the Governor's Council, which *ex officio* was the Bench of the Provincial Court. The Governor's Council was also the Upper House of the Maryland Legislature. The attorneys of the day, from their education, became the clerks of all the public bodies, "Clarkes," as they were then called. In 1638, Mr. Lewger



GEORGE CALVERT 1ST LORD BALTIMORE.

was made Clerk of the House of Burgesses, and, in 1644, was the Secretary of the Province. During his incumbency of the office of Secretary of the Province, and while Gov. Calvert was temporarily absent from the colony, and Mr. Giles Brent was acting Governor, Mr. Lewger, having heard that the Susquehannock Indians were expected at Piscataway, some sixty miles distant, to hold a conference, issued a commission to Captain Henry Fleete empowering him to treat with them for peace.

Governor Brent thought Mr. Lewger had overstepped his authority, and on August 7, 1644, ousted him from the office of Secretary. Governor Calvert returned in September, and Mr. Lewger was immediately restored to his former position.

While Secretary, Mr. Lewger was also the Attorney General of the Province, and beside the prosecution of personal suits for Lord Baltimore, acted as the prosecuting officer of the Colony and gave legal opinions, when asked by the Governor. In 1645, he gave an opinion in the case of William Lewis, a staunch Catholic who had forbidden his Protestant servants from reading a Catholic book. Although the evidence showed that the servants had read the book aloud in his presence, evidently to provoke him, yet when Lewis was before the Council and Court in one, consisting of Gov. Calvert, Capt. Thos. Cornwallis and Mr. Lewger, the two former members asked Mr. Lewger, as the one member of the legal profession in the Council, what should be done with Lewis, "for his offensive speeches and unseasonable disputations in point of religion, contrary to public proclamation to prohibit such disputes." The Attorney General gave opinion that "Lewis should be fined five hundred pounds of tobacco, and remain in the sheriff's custody until he should find sufficient security for his good behavior in time to come." Lewis had a sad fate. He was one of the four men shot to death by the Puritans of Annapolis after the battle of the Severn, which they had in 1665-66, with Lord Baltimore's adherents.

It was on John Lewger that the Lord Proprietary depended in the troublous times when Charles the First was captive in the hands of Parliament, and, in 1648, the Proprietary issued a warrant to the Governor and Mr. Lewger, "directing them to collect and take care of so much of his private possessions as might be saved from the general wreck of his fortunes."

Mr. Lewger, as conservator of the peace,

also had authority to "prove last wills and testaments of persons deceased, and to grant letters of administration." In fact, Mr. Lewger, at this period, embodied a very large part of the judicial system of Maryland. He yet had another office. In September, 1643, he had been made "by special commission," "a member of the Privy Council of the Province," which commission had been preceded by a special appointment and commission as judge in the Province, the first person in the colony to have that dignified office and title, and, at the same time, holding the intimate relation of counsellor to the Governor." Mr. Lewger retained to his death, which was about 1648, the confidence of Lord Baltimore.

JAMES CAUTHER.

The name of James Cauther is recorded in the annals of Maryland jurisprudence as the first person to act as attorney for another. He made a simple confession of debt, but to Lewger belongs the undisputed position of founder of the Maryland Bar. The Court in which the confession was acknowledged, began at St. Mary's January 23, 1637, (old style). Thomas Passmore, a carpenter, and Roger Moy had been sued by Thomas Cornwallis, Esq., on an assignment from John Neale, of Accomack, in Virginia, for three thousand pounds of tobacco. The attorney made his mark, "J. C." It must not be taken from this incident that our "learned brother," could not wield the pen, for there are cases where men who filled responsible positions in the colony at this time, made their mark, and it is quite evident it was only the custom to have a sign and signet of the name, as the superscription of one's Christian title.

On February 5th of the same year, "Attorney Cauther appeared for Thomas Passmore, complainant, against Thomas Charington, Joseph Edlow and Anson Barnum, in a plea of debt of five hundred and fifteen weight of tobacco, due the said Thomas Passmore."

Mr. Cauther was planter as well as attorney, and was so designated in the records when appointed the administrator of William Wassells, deceased. Mr. Cauther, too, like Mr. Lewger, had men servants, for he complained to the Court "that Edward Eason had departed out of his service afore his terme expired to the damage of the plaintiff to the value of five hundred pounds of tobacco." Mr. Cauther was a member of the General Assembly of 1637, representing St. Mary's Hundred, St. Mary's County, and holding the proxy of Thomas Passmore, carpenter, a member from the same hundred. Mr. Cauther did not put in his appearance with legal promptness, and, on the second day of the session was amerced for non-attendance. In the afternoon of the second day, he was again fined for non-attendance. This was on Saturday, and well might the legislators of to-day learn a lesson from the industrious Pilgrim Fathers of Maryland—the Assembly adjourned until Monday morning at eight o'clock! Mr. Cauther had arrived by this time and took part in the trial of Thomas Smith, charged with felony and piracy, and voted for the verdict of guilty.

This trial was conducted before the General Assembly because the necessary courts had not yet been established, and it was considered proper to give the trial the sanction of law, to have the whole Province, as represented in the General Assembly, assent to the conviction. Mr. Cauther was again a member of the House in 1638. In 1641, he was entitled to a seat but preferred to be represented by a proxy to Thomas Morris. This proxy did not arrive in time to prevent Mr. Cauther, with fifty others, from being fined twenty pounds each of tobacco for their non-attendance. Mr. Cauther died early in January, 1643, as appears by proceedings in the Courts; not by resolutions of respect and regret, for that custom had not yet obtained in the Bar, but by testamentary action on his estate.

CYPRIAN THOROUGHGOOD.

Cyprian Thoroughgood is the third in the list of Maryland Attorneys. On the 7th of August, 1638, he appeared as an attorney for Thomas Copley, Esq., suing for John Norton for damages, one thousand feet of "sawn boards" for a price agreed upon but who refused to furnish the lumber, and he claimed damage of two thousand pounds of tobacco.

CUTHBERT FENWICK.

Cuthbert Fenwick, the name fourth in the list of Maryland attorneys, was a prominent person in the infant colony. The Province was settled in March, 1634, and on the 13th of March, 1637, Mr. Fenwick appeared in the House of Burgesses and claimed a voice in the Assembly as a freeman and was admitted. All freemen were allowed, at that period, voice and vote in the Assembly. He was one of those who voted for the verdict of guilty in the case of Thomas Smith, convicted of murder and piracy. Mr. Fenwick was not a passive member of the House, but showed his aggressive spirit in being one of three members who voted against a bill for the support of the Lord Proprietary. He also voted against the admission of the delegates from St. Mary's. Mr. Fenwick, however, did not suffer on account of his vote against the Proprietary's support, for, in September, 1640, in consequence of the prolonged absence of Captain Thomas Cornwallis, from the sittings of the Governor's Council, which was much regretted by the Proprietary, to Cuthbert Fenwick was written this unique letter of appointment: "Nevertheless for the respect we bear unto him, (Thomas Cornwallis,) and out of our care that so great a member of our province may have his attorney there to take care of such things as may concern him, therefore, we do hereby authorize you to repair, personally, to the said Assembly, (the Governor's Council was the Upper House of the Legislature,)

there to have place, voice, and seat, as our said councillor's proctor or attorney during his absence." This honor, sitting by proxy in the Governor's Council, appears never to have been given another. This vicarious office of Councillor did not affect his right to sit in the Lower House, although being a councillor he became a member of the Upper House at the same time. While he was thus a member of both Houses, he was amerced fifty pounds of tobacco for being absent from the sessions of the Lower House. In the same session he voted against the Lord Proprietary's Prerogative Bill and was of those who supported the People's Liberty Bill. This defence of the people's rights and intensest opposition to the encroachments of the Crown or Proprietary upon the liberties of the freemen were indicative of the spirit that always animated the lawyers of the Province, who, in every conflict of the people against arbitrary power on the part of the Executive Branch, whether King or Proprietary, were invariably on the side of the populace. In 1647, Mr. Fenwick successfully kept a debtor out of the Assembly, by urging and proving that Nicholas Gwyther, a delegate from St. Mary's, was not a freeman and owed him service.

Mr. Fenwick was the constant recipient of marks of the high esteem in which he was held. He was one of a committee of three appointed at the session to prepare a list of grievances of the Province to present to the Lord Proprietary, and, contrary to law, his Indian servant was allowed to remain in the Province and have ammunition sold him.

Mr. Fenwick appeared first on the rolls of attorney of the Provincial Court in 1644, when he recorded a power of attorney from Richard Bennett of Virginia, who, afterward in 1649, led the Puritan refugees, driven from Virginia to Annapolis, where asylum had been given them by Lord Baltimore's representatives. Mr. Fenwick had also another Virginia client, Thos. Horlkins, who

secured his professional services to collect a claim of two hundred pounds of tobacco. Thus the fame of Maryland's attorneys began early to spread beyond their colony, an earnest of the day when they were noted for their ability throughout the American plantations.

These early attorneys of Maryland had the same courageous sentiments that have ever distinguished the Bar of "the old Line State." They did not hesitate to defend or attack any citadel in securing the rights of their clients. As attorney of Capt. Thomas Cornwallis, Cuthbert Fenwick had a bill of exchange for two thousand pounds sterling protested against Lord Baltimore himself, and claimed one hundred thousand pounds of tobacco damages to his client. When the sheriff refused to serve the writ on Gov. Calvert, the Proprietary's representative, Mr. Fenwick had a warrant issued by the Court, directed to Thomas Matthews, the recusant officer, and "*siliter in causa ipsius Egidy Brent, p. Secretarim.*" The outcome of the suit is not recorded. If the records warrant any conclusion, we may infer, from the number of suits he represented, that the fourth attorney of the Maryland bar was the leading practitioner of his day.

CAPTAIN THOMAS GERRARD,
ATTORNEY AT LAW.

Thomas Gerrard is one of the most interesting characters of Maryland's early history. He was attorney, councillor of the Governor, conservator of the peace, and eventually a fighting captain of the Maryland militia, with the dignity of a Lord of a Manor combined. In March, 1639, Mr. Gerrard was made a conservator of the peace in St. Clement's Hundred, St. Mary's County. In those days, the leading citizens of the community filled these responsible places. On the 29th of October, of that year, he was given a commission to use force against certain Indians who were pillaging in the Province. November 17,

1643, Mr. Gerrard was appointed a member of the Governor's Council, being at this period a practising attorney.

In the year 1657, Mr. Gerrard fell into divers temptations and yielded to the blandishments of strong drink, and, as charged in the information of his Lordship's Attorney General, Richard Smith, betrayed the secrets of the debates in the Governor's Council, "aymeing at his owne greatness which, in

unsettled times, he might uphold, when by the sad distractions of this province, no one party could, for the endeavors of the other, such factious spirits sufficiently control, false and scandalous speeches and reports hath cast abroad, insinuating cunningly unto the people that the Governor would yeald unto anything, (how prejudiciall to that party, that had, as friends, asserted his Lordship's just rights,) requested by the people of Ann Arundell, then and there saying the Governor would

give them anything, or words to that effect. Which words, so full of malice, cunning, and covertly uttered to set our wounds, even then scarcely healed, fresh on bleeding and to embroile the country in worse and more dangerous distempers." Then the information charges that the words amounted to mutiny and sedition. Mr. Gerrard also insinuated that Gov. Fendall took a half the Lord Proprietary's rents in collecting them, and finally announced that he would not sit

with such rogues as composed the Governor's Council.

All this referred to the late rebellion in Anne Arundel against Lord Baltimore's authority that resulted in the Battle of the Severn and the overthrow of Lord Baltimore's forces. This had occurred about ten years previous, and Lord Baltimore had had the Province restored to him about four years, and the wounds, indeed, were not yet healed,

but the Governor, Lord Baltimore's representative, was endeavoring to mollify the late enemies of the Proprietary in Anne Arundel, and this was offensive to Capt. Gerrard, who had been a valiant defender of Lord Baltimore's interests.

Depositions followed the information as to Mr. Gerrard's condition on the day of the utterance of the seditious speeches charged. Mr. Henry Coursey deposed that "he was on board Co-vill's ship with Mr. Gerrard, that Mr.

Gerrard had drunke something extraordinary, but was not so muche in drinke but that he could get out of a cart's way, and further saith not."

Mr. Gerrard was banished from the Province, and his whole estate confiscated. In 1660, he sued for pardon. This was granted on condition that he pay certain charges, and one hundred pounds in money, and five thousand pounds of tobacco, and that he be ineligible as a member of the House of Bur-



LEONARD CALVERT 2D LORD BALTIMORE.

gesses. Mr. Gerrard was the gallant Captain Gerrard, in Gov. Stone's forces, at the Battle of the Severn, and after the battle was condemned to be shot. Some pious women and the soldiers saved him and five others from this sentence, but four of the prisoners were executed.

Capt. Gerrard was the Lord of St. Clement's Manor, the incipient system of Lord Baltimore to create an hereditary aristocracy in the Province. During his Lordship of this manor, he was indicted by the Grand Jury of the Manor for not providing "those instruments of justice," a pair of stocks and a ducking stool for the use of the Manor Court.

Considering the number of inhabitants of the Province of Maryland at this period, the attorneys formed a very respectable percentage, for, although the Courts took knowledge of their conduct, yet there was no apparent examination for qualifications, and frequently a single name appears on the record as an attorney, evidently an attorney in fact, and not of law. The sheriffs and clerks also acted as attorneys, and it became such a grievance that as early as 1666 an act was passed preventing officers of the Courts from acting as attorneys in cases pending in their tribunals. The Legislature soon after took the attorneys in hand, and passed a number of acts regulating their conduct of cases, and fixing the fees they might charge for them in the several courts. The lowest was one hundred pounds of tobacco in the County Courts and the highest six hundred pounds, for appearing before the Governor and Council,—the Court of Appeals of the colony. Amongst those who appear as attorneys between the period of the settlement of the Province, 1634 and 1660, are found the names of Thomas Notley, afterwards Governor of Maryland; John Weyville, George Manners and Marks Pheypo. The well-known Brent family gave two very interesting additions to the bar of the new American Plantations,—one Giles Brent. In 1642, he afforded Attorney General Lewger the opportu-

nity for the most important suit of his term of office—that of charging Giles Brent with "having moved and propounded to the Lieutenant General in an enterprise upon the Susquehannocks," and then having abandoned it on the ground of "illegalities then found in the commission, which illegalities, nevertheless, upon some new thoughts, *he easily swallowed*, and issued warrants for twenty soldiers." While these proceedings were in progress, Mr. Brent, after a later fashion, made over his goods, chattels and estates to his sister, Mrs. Margaret Brent. Mr. Brent, as his own attorney, put in such a vigorous answer to these charges that they were expunged from the records, "*because they were of such a scandalous character.*" Mr. Brent was a fighter. He demanded that a full record of the proceedings be kept because he intended to have the matter against him "enquired of by counsell, learned in the law of England, whether I have had wrong in the judgment passed against me in the court yesterday, being the 7th day of November, or whether, or not, in the opinion of such counsell, I have wrong in it, I intend to seek my right at the hands of my sovereign, the King, and for this reason I desire that my answer and the complaint against me, and the judgment and all other proceedings in the cause may still remain upon the records."

Mr. Brent's standing as an attorney was not injured by the proceedings against him, for he appeared shortly afterward with several powers of attorney to prosecute suits, one being from a client in Kent, and another from one in Virginia, and a few years afterward he became the Attorney General of the Province itself. In 1647, while acting as Attorney General, he was called upon for an opinion on this question: Leonard Calvert, Governor of Maryland and representative of Lord Baltimore in Maryland, having died, "was the administratrix of Leonard Calvert, his Lieutenant General and Governor of the Province, the representative of Lord Baltimore in Maryland?" Mr. Brent

gave opinion that she was until some other representative was appointed. Mrs. Margaret Brent, being the Governor's administratrix, became the legal representative of Lord Baltimore's estate in the Province, and right royally did she administer his affairs in every direction. Indeed, the new woman had early asserted herself in Maryland. February 22, 1647, Mrs. Brent appeared in Court with letters of attorney from both Mark Cordea and Thomas Stone. At this time, 1648, Mr. Brent alternately acted as his Lordship's attorney, special judge, advocate in civil suits and Governor of the Province.

MRS. MARGARET BRENT.

Another interesting character had now flashed athwart the bright pages of Maryland history, Mrs. Margaret Brent, mistress by the gallantry of the men of Maryland, who thought when honorable age came to an unmarried maiden, then she should be dignified with the title of madam. So then this Mrs. Brent was Miss Margaret Brent, sister of Giles Brent, sometime Governor of Maryland. Her appearance in the Provincial Court began in 1642, when she made frequent demand of the Court to assist her to collect her personal debts, but, later in its records, she is on the dockets as the attorney of the Lieutenant General, and, as such, was entered on the proceedings of the Courts, and was, therefore, the first woman lawyer in America, and, doubtless, of the world, if we except the lovely Portia who withstood, so successfully, the claim of bloody Shylock.

The first case that Mrs. Brent conducted for a client was, when armed with a power of attorney from Fulke Brent, she demanded three thousand pounds of tobacco from Marmaduke Snow, and the same day had a warrant issued to attach that amount of tobacco in the hands of William Popes. A few days later Mrs. Brent appeared with a power of attorney from Edward Packer, and demanded of Robert Kedger four hundred and sixty pounds of tobacco. It was, however, as the

administratrix of Governor Leonard Calvert, that the woman lawyer of early Maryland obtained her greatest historical prominence, and, in that capacity, she frequently appeared in the Courts, and later invaded the General Assembly and demanded the right to vote in that body, one vote for herself and one as the representative of Gov. Calvert's estate. This claim was denied, but, in Court, her standing as attorney was never questioned, and she was one of the most active practitioners of her day, her name appearing over and over again in cases of interest and importance. In every respect Mrs. Brent discharged the duties of attorney in cases entrusted to her with that fidelity and punctuality that become the members of an arduous and responsible profession.

Very early in the Province were set up almost every character of Courts to vindicate the rights of the Freemen of Maryland, and the Courts were as punctilious in administering the law as the Freemen were in demanding it. The Courts were dignified bodies that permitted no infringements of their rights and required attorneys to proceed according to the well-settled rules of pleading. These Courts allowed no contempts to pass unnoticed. An information was filed against George Pye, on February 13, 1643, charging that while the Court was "importunately pressing and charging the jury that were upon the triall of John Elkin, to proceed according to their evidence and conscience, and arguing and pleading the crime against the prisoner at the bar, the said George Pye, in an insolent manner upbraided and reproached the whole court in these, or the like words, *viz.* that if an Englishman had been killed by the Indians, there would not have been so much words made of it, or to that effect, to the great contempt and scandall of the court, and the ill example of others." Pye declared that he did not speak the words alleged, but, upon the testimony of Mr. Thomas Green, he was found guilty, and fined one thousand pounds of tobacco. Wal-

ter Dean, for swearing "by God," in the presence of the Court was fined five pounds of tobacco. The Courts of that age had a wholesome horror of the perjurer. John Gonoore, for committing that crime was sentenced to be "nailed by both ears to the pillory, with three nails in each ear, and the nails to be slit out, and afterwards to be whipped with twenty good lashes, and this to be executed immediately before any other business of the court to be proceeded upon." For a similar offence Blanche Howell was adjudged to lose both ears. There is a refreshing feature in these quaint and homely proceedings of an heroic age, that is creditable in the highest degree to the Maryland Pilgrims, — the singular absence of dark and bloody crimes. For a period of thirty years, leaving out the sea-fight between the adherents of Clayborne and Baltimore, there were only two homicides and one unprovoked battery. The victims of the homicides were Indians, and it is honorable to notice that the Court was extremely careful to bring the guilty parties to justice, in one case discharging a jury about to try the case, because the jurors doubted that "pagans" had the same standing in Court as Christians. The proceedings were not uninteresting, however free from the sensational crimes of this age. An amusing contract is recorded in the Provincial Court on September 24, 1657, "wherein Peter Sharpe and Judith Sharpe contracted to remove their daughter, Elizabeth Gary, to the house of Mr. Thomas Davis, at the Cliftes, and there she is to remain for the space of six

weeks, and Robert Harwood is to have, during all the said time, full, free, and perfect liberty, bringing one or more of the neighbors with him, to have all freedom of discourse with the said Elizabeth Gary and to use all fair and lawful endeavors with her to marry or contract marriage to and with the said Robert Harwood, one or more of the neighbors being always present with the said Robert Harwood and Elizabeth Gary when they are in company together; the said Robert Harwood paying for the said Elizabeth Gary, her entertainment, during her stay at the said Thomas Davis' his house." The consideration for this contract was that Harwood should withdraw a suit he had begun for damages against the Sharpes for forbidding him prosecuting his suit for the fair Elizabeth's hand. Deep have been the influences Maryland lawyers have exerted upon their own State and Commonwealth. They were learned in the law, bold in asserting their rights, and in every contest of the people for their rights were, as a body, invariably on the side of the people. In national affairs they have exerted a wide and beneficial power, and it is only to mention the names of Charles Carroll, of Carrollton, William Pinkney, Samuel Chase, Thomas Johnson, Roger B. Taney, Francis Scott Key, Henry Winter Davis, and Reverdy Johnson, to recall the fact that Maryland lawyers have, at all epochs of the country's history, been wise in its deepest councils and influential in its broadest policies.



CHAPTERS FROM THE BIBLICAL LAW.

VII.

A CONVEYANCE OF LAND TO THE PROPHET JEREMIAH.

BY DAVID WERNER AMRAM.

IN the February number of the "Green Bag," in an article entitled "The Purchase of the Cave of Machpelah," I described the method of conveying land before the introduction of written records. In the present article, I shall describe the method followed during the last days of the Jewish Kingdom, at the beginning of the sixth century before the Christian era, as illustrated in the acquisition by the prophet Jeremiah of a field belonging to his kinsman.

At this time the art of writing seems to have been generally practised, and accordingly the form of procedure which was in vogue during the earlier period was modified. The case under consideration shows distinct traces of the influence of Babylonian law, more especially in the duplication of the deed of conveyance and in the manner in which it was placed on record.

For the purpose of better understanding the reason for the introduction of this fragment of ancient law into the book of the prophet Jeremiah, it must be borne in mind that the doom of Judea was impending. The King of Babylon had entered the land, had deposed the King of Judea and had placed his uncle, Zedekiah on the throne. Zedekiah thus owed his crown to the grace of the Babylonian monarch. Babylonian soldiers, tax gatherers and other officials appeared in all parts of the land, and wise statesmen foresaw the end of Jewish independence.

Among these farseeing men was Jeremiah, a man of noble descent, of priestly lineage and of commanding position in the state. He had foretold the political destruction of the Jewish state, and because of his prophecy King Zedekiah had thrown him into prison.

Jeremiah's influence upon the people was very great, and now that he had accomplished his purpose in opening the eyes of the people to the true condition of affairs and impressing them with the fact that the state was in its decline, his utterances took on a new aspect, and it became his purpose to console the people with the thought that although the present state was doomed, a new state would be established upon its ruins.

For the purpose of teaching this to the people he cast it into concrete form and he used the incident about to be described in this paper, as a symbol of the re-establishment of the state. The point lay in the fact that he, Jeremiah, although then in prison because of his prophecy of the destruction of the state, nevertheless took a deed of conveyance of land, thus manifesting his belief in the fact that the state would be re-established, and that the houses and fields would yet again be bought, and that the people would be brought back out of their captivity.

This city whereof ye shall say, it shall be delivered into the hands of the King of Babylonia by the sword and by the famine and by the pestilence, behold I will gather them out of all countries and I will bring them again unto this place, and I will cause them to dwell safely. . . . Like as I have brought this great evil upon these people, so will I bring upon them all the good that I have promised them and fields shall be bought in this land, whereof ye say it is desolate, without man or beast; it is given into the hands of the Chaldeans.

Students of Roman history will recall a singular event recorded by Livy (Book XXVI, chapter 11), which indicates faith in the ultimate supremacy of the Roman arms equal to

Jeremiah's faith in the ultimate return of the people of Israel to their ancient habitations. Livy records the fact that when Hannibal was approaching Rome, he was startled by the information obtained from a Roman prisoner, that the ground on which his army was then camping, had been sold at Rome, and that the price was not lowered. Thus the Roman citizen at once indicated his contempt for the invader and his perfect faith in the ultimate success of his country's arms.

The details of this conveyance are carefully given, and judging from the manner in which it is described, it was evidently the method of conveyance commonly in use.

While Jeremiah was in the court of the prison in which he was confined by the order of the King, his kinsman, Hanamel, came to him and said, "I pray thee, buy my field that is in Anathoth, which is in the land of Benjamin, for to thee belongs the right of inheritance, and to thee belongs the redemption. Therefore buy it for thyself." When a kinsman desired to dispose of his inheritance, it was the right of his nearest kinsmen to purchase it, and only after the kinsmen in the order of their precedence, had waived their right, were strangers permitted to acquire it. This right is spoken of as the right of inheritance and the right of redemption. The nearest kinsman was the one who would have inherited the land upon the death of its owner, and he was also the Goël (a term commonly translated "Redeemer"), whose duty it was to take the land by purchase from the owner, but who had the privilege of waiving his right to redeem, so that it passed to the next kinsman and so on.

Jeremiah, as the nearest kinsman of Hanamel, exercised his right to purchase the field. The formalities consisted of weighing the purchase money, delivering it to the seller, preparing, sealing and attesting the deed of conveyance, and placing the deed on record. The substance of the manner of acquiring title was the same as in our own days. Jeremiah thus describes the proceed-

ing: "I bought the field from Hanamel, my uncle's son that is in Anathoth, and I weighed out unto him the money, seventeen shekels of silver." "Shekel" was not a coin but a standard weight, and afterwards became the name of a particular piece of money. "And I wrote it in a deed and I sealed it up and had it attested by witnesses, and I weighed the silver in the balance."

The entire transaction was public and all the details were performed in the presence of witnesses in order that no dispute might arise as to the question of title. This was absolutely necessary during the time when no written record was made, and even in the days of Jeremiah, when a written record of the transaction was made, the publicity which had always been considered necessary to insure a good title was still a feature of the procedure. The purchaser prepared the deed, and, as we shall shortly see, he prepared it in duplicate. One copy was sealed up and the other was left open. The purchaser, after preparing the deeds, presented them for inspection to the witnesses, who attested them by making their mark or by signing their names. The silver was weighed in the balance. In all probability there was in the forum of each community an official scale bearer like the Roman *Libripens*, whose duty it was to weigh the money. It is not to be presumed that every purchaser carried scales with him for this purpose. After the two deeds were prepared, one was carefully sealed and deposited among the public records never to be opened unless the other was lost, or for the purpose of correcting it in case it had been tampered with or altered. It is possible also to infer from the account of this conveyance that both deeds were placed on record. One of them, that is the one that was sealed, was not open for the inspection of the public, and the other was left open for such inspection. If this is the manner in which the documents were recorded, it is similar to the practice which now

prevails in the office of the register of wills. The original will is filed on record and is not open for public inspection, except under order of the court, whereas a copy of it, duly prepared, is placed on record in the will books and is open for the inspection of all the world. There is some evidence from recent discoveries in Babylonia that the latter method is the one alluded to in this case.

Babylonian explorers have found legal documents executed in duplicate on clay tablets, one of which was inclosed within the other. In other words, a tablet was first prepared and then a case was made for it, and on the outside of the case a copy of the inclosed tablet was inscribed; the case was then sealed, and both copies, one within the other, were filed away among the records. This method would account for what follows in our case, in which Jeremiah says, "And I took the deed of the purchase, both that which was sealed and that which was open, and I gave the deed of purchase unto Baruch, the son of Neriayah, in the presence of Hanamel, my kinsman; and in the presence of the witnesses who had signed the deed of purchase; and in the presence of all the Judaeans who were sitting in the court of the prison." This public delivery of the document thus thrice attested in the presence of the seller, the subscribing witnesses, and the witnesses standing round about, was accompanied by the following charge:

And I charged Baruch in their presence as follows, "Take these deeds, this deed of purchase, both the sealed and the open deed and place them on record, in order that they may last many days, for thus hath said the Lord of Hosts, the God of Israel, 'yet again shall there be bought houses, fields and vineyards in this land.'"

In his charge to Baruch, the words of the Biblical text are, "Take these deeds . . . and place them in an earthen vessel." This is a literal translation of the Hebrew text. I have translated it however, "place them on record" because the earthen vessel in which

the documents were placed was merely the receptacle in the recording office in which the documents were preserved. The object of recording them was as stated by Jeremiah, that they might last many days, for it was presumed by him that, even in the troublesome times which were then impending, documents thus preserved in the public record office were safer than if they had remained in the possession of any individual; and, as was stated at the beginning of this article, this was the point of the whole transaction. This was the lesson that Jeremiah sought to inculcate, to wit, that in spite of the approaching doom of the state, the ordinary affairs of life would continue as theretofore, that houses and fields and vineyards would continue to be bought and sold, and eventually, order would again be brought out of anarchy, and a stable government be re-established.

This transaction took place in the court of the prison in the city of Jerusalem, and it is to be presumed that the record office to which allusion is made, was in the same city. Modern explorations in Jerusalem have not yet brought to light this public record office, and there can hardly be any doubt that somewhere down in the subsoil of the present city of Jerusalem there lie buried the record chambers of the ancient kingdom and commonwealth of the Jews, and it is to be hoped that the day is not far distant when explorations may be made on Mount Zion which will yield invaluable treasure to the archeologist, the student of the Bible and the historian.

VIII.

THE SALE OF ESAU'S BIRTHRIGHT.

Ancient Hebrew tradition recognized the kinship existing between the various Semitic tribes dwelling north of the Arabian Desert, and in various legendary accounts, we find attempts to discover the origin of this relationship. To this class of legends may be assigned those found in the Book of Genesis,

which deal with the genealogy of the patriarchs from Adam down to Joseph. The Book of Genesis in which these genealogies are preserved is a perfect mine of ancient law and custom, mythology and social usages, at times given with fullness and in detail, and at other times simply suggested in a word or passing allusion.

The simple and well known story of the sale of Esau's birthright to Jacob contains much that is hidden to the eye of the superficial reader. It would not be impossible to reconstruct from this simple tale a large part of the life and law of the ancient Hebrews. As it is commonly taught in and out of Sunday schools, it simply becomes the vehicle for the communication of a certain moral truth, and not less frequently, for the communication of certain prejudices against the race of which Jacob is said to be the father.

Studied impartially, the story contains an interesting chapter of ancient law. Esau and Jacob were the sons of Isaac and represented the two great classes of primitive society. Esau was a huntsman and Jacob was a herdsman: as the Bible puts it, "Esau was an expert hunter, a man of the field, and Jacob was a plain man dwelling in tents." Esau represented the old order of things which was passing away, and Jacob represented the new order that was taking its place. The primitive nomads were all hunters, relying for their sustenance upon their skill with weapons of chase. By and by, in the course of their social evolution, they were converted from huntsmen into herdsmen, even as the latter were afterwards converted from herdsmen into agriculturists, and as in our own days we see agriculturists converted into industrialists.

The ultimate meaning of the story of Jacob and Esau, and the purchase of Esau's birthright by Jacob, simply is that the herdsman supplanted the huntsman, and in that sense of the word, Jacob is properly named

"the supplanter," this being one of the meanings of the Hebrew name.

Immemorial custom gave to the eldest born certain rights over the other children of the family. The eldest born succeeded the father as the head of the family, and by virtue of his birthright he obtained a larger share of the patrimonial estate. There was no fixed uniform custom governing the birthright and its incidents, for we find some references throughout the Bible indicating that the birthright was inalienable, and others, as in the story of Jacob and Esau, that it could be sold; some when the will of the father, others when custom or law determined who should enjoy the birthright. In the present case, it seems that Esau enjoyed the birthright by virtue of his primogeniture and that he had the right, even during the lifetime of his father, to sell his birthright to another member of his family.

The manner in which this contract of sale was executed is generally considered somewhat informal, and yet, upon examination we find that all the necessary formalities and incidents to the validity of the sale were observed, with one exception; there were no witnesses present. Neither of the parties, however, seemed to have considered this informality as in any way affecting the validity of their contract. Although Esau believed himself to be aggrieved, he nevertheless recognized the validity of the sale and acknowledged it, although apparently, he might have taken advantage of the fact that no witnesses were present, and have repudiated it. This is usually credited to the honesty of Esau, but is more properly to be ascribed to the fact that although no witnesses attested the sale, Esau swore an oath, the sanction of which prevented him, through fear of invoking the wrath of the Higher Powers, from breaking it.

Esau, having come in from his hunt tired and faint, asked Jacob, who was boiling some pottage, "Let me swallow down, I pray thee,

some of yonder red pottage, for I am faint." The Biblical text goes on to explain, "therefore was his name called Edom (the red one)."

Jacob, who had probably long been considering the question of acquiring Esau's birthright took advantage of the opportunity and said to him, "Sell me this day thy right of first born." From our point of view it would probably have been fairer on Jacob's part to have fed Esau first, and purchased his birthright afterwards, but Jacob seems to have had no scruples about the ethical aspect of the question, nor did Esau at the time see anything wrong in it, although he was afterwards very bitter against Jacob, who had apparently the best of the bargain.

Esau's attitude toward his rights as the first born were those of the rough man of the woods. He said, "Behold I am going to die, and what profit then can the right of the first born be to me?" In this answer of Esau may also be seen reflected the attitude of the earlier stages of society towards the rights established by the newer and later stages. It is the contempt of the barbarian for the products of civilization.

The birthright was an intangible thing, and like all incorporeal things could not pass by delivery. Had this sale taken place publicly before some lawful authority, it would in all probability, have been accompanied by some symbolical act to give it validity. There being no witnesses present, however, recourse was had to the solemnity of the oath for the

purpose of binding the bargain. Jacob said to Esau, "Swear to me this day," and Esau swore unto him, and by this oath, he sold his birthright unto Jacob.

The oath, that is to say the invocation of the Higher Powers to attest an act, was the common form of binding transactions in ancient times and has survived as such unto our own days. It is common for men to attest the truth of what they are saying, and to strengthen their promises, by an oath. Anciently, the force and effect of the oath was much greater than it is to-day. The Higher Powers were always the third parties in the transaction, and were presumed to be present and to participate therein. Contracts were made in the presence of God or in the presence of the household spirits whose immanence was always assumed. A sacrifice of some sort usually accompanied the conclusion of the contract, or, in the absence of such sacrifice, an oath was taken calling upon the ever present Deity to witness.

The sanction of this oath must have been very great, else it may be presumed that Jacob would have taken precaution to have had witnesses present at this transaction in order to guard against its repudiation by Esau, but the oath was too sacred to be broken, and the fear of divine vengeance was the strongest sanction that the transaction could have had.



THE FIRST CHIEF JUSTICE OF CAROLINA.

BY A. M. BARNES.

THE drafting of the Great Fundamental Constitution, called the Grand Model, that masterpiece of tomfoolery emanating from the visionary Locke, gave a black eye to the law; in fact, knocked it out ere it had entered the ring, so to speak. For this extraordinary scheme for the establishing of an aristocratic government "in a colony of adventurers in the wild woods, among savages and wild beasts" declared it "a base and a vile thing to plead for money," and provided that no one save a kinsman should be allowed to plead another's cause until he had taken oath that he was not to be paid for so doing.

In place of lawyers and the systematic administration of the law, there was the farcical judicature of the Grand Council. This court of mockery consisted of the Palatine, the seven Proprietors, and forty-two counsellors, as they were called. Each of these counsellors was required to take oath that he would give faithful aid to the Governor in dispensing equity and upholding justice.

This might have been very well had the Grand Council been invested, at this early day, with the power of independent action. But this great legal body, so pompously styled "The Senate of Carolina," could then take no important step within itself. For as a part of this Grand Council, the majority of the Proprietors, resided on the other side of the Atlantic, there must be consultation with them; then the long wait till they, in turn, conferred with the Royal Government, and prepared and forwarded their various "opinions," "decisions," etc. And, as frequently happened, their opinions did not at all coincide with those held by the Grand Council.

Thus there sprang up, and greatly to the harassment of the people of the Colony, a

dual judicature, a kind of legal monstrosity with two heads, the one constantly getting in the way of the other. This brought about jealousies, collisions, and what not, while the people had to put up with delays and irregularities not only exhaustive of patience but of purse. And while they waited for the adjustment of some claim of vital import, the Grand Council was consuming its time and wasting its eloquence with such affairs as that of the sentencing of one Thomas Screman, "who did feloniously take and carry away one Turkey Cock of the price of tenn pence lawful money, contrary to the peace of our Sovereign Lord, the King."¹

It is no wonder the people became restive under such a farcical administration of the law, and began vigorously to petition for a more satisfactory *status* of legal affairs. Letter after letter was written the Proprietors. Among them went one from the eloquent Florence O'Sullivan, Deputy of Sir George Carteret, which document has been carefully preserved. O'Sullivan showed that he righteously believed it impossible for the country to get along without lawyers. He wrote:

"Wee pray you send us an able counselor to end controversies amongst us and put us in the right way of the management of yo' collony . . . if you please to stand by us," etc.

It is a remarkable proof of both the stubbornness and stupidity of the Proprietors that the request of O'Sullivan and others met with no response until twenty-nine years after it was made!

In 1698 the Proprietors, discovering that their own interests required more attention paid to the Courts in their Colony, sent out

¹ McCrady's History of the Proprietary Government of Carolina, p. 149.

a Chief Justice and an Attorney General. The latter was the notorious Nicholas Trott, famous, among other things, for his connection with the trials of the pirates; and the former, Edmund Bohun, of whom this article proposes further to treat.

Up to this time the Colony had not only been without a prosecuting officer of any kind, but the entire Court, so far as its operating machinery was concerned, had consisted of a Judge and a Sheriff combined. He issued warrants, served them; then, donning his judicial toga, dispensed justice from the bench. There was consequently much grievous complaint, and the charge of far graver things than mere irregularity.

As stated, the Proprietors felt at last compelled to take in hand the providing of a better system of courts for the people of their Colony. But to the last they were piggish, and took to themselves the credit of it all. On sending the Chief Justice they wrote to Governor Blake and to the Council :

"Gentlemen: Wee are intent upon making you the happy settlement in America . . . and because good laws without due exercise are a dead letter, and the reputation of a just execution of them is inviting, wee have commissioned Edmund Bohun, Esq., a person who has had a very good reputation in the execution of the laws of England to be your chief justice; who besides the advantage of his owne estate, which will be transmitted to him, is allowed by us a very good salary to keep him beyond the reach of temptation of corruption."

Even then the Proprietors realized that their power was waning; but still, with their usual niggardliness, they failed to make liberal bid for the return of the good-will of their colonists. Instead of sending them as their Chief Justice, a man skilled in the law, capable of dealing with its knotty problems, they engaged instead the services of a layman, one who had been a mere Justice of the Peace, and who, for the considerations that he had a son in the Colony and that the sudden prospect of the Chief Justice's robe was

very tickling to his vanity, was willing to accept the munificent salary of £60, allowed him as a guard against the "temptations of corruption."

But though he was no lawyer, Mr. Bohun was a gentleman, both in birth and in breeding. Further, he was a cavalier, the scion of a noble house, one of those mentioned by Macaulay as "having broken the Saxon ranks at Hastings," in the days of knight-hood, "and scaled the walls of Jerusalem." He was, too, a scholar, a writer, and a translator of books. He knew many languages, was fluent in speech, and graceful with the pen, yet as incapable of dealing with the intricacies of the law as any other man so deficient in legal training would have been.

Mr. Bohun was commissioned Chief Justice on May 22, 1698, and from that date, as with the man in the old nursery rhyme, who entered into matrimonial alliance, "his troubles began." Perhaps he might have fared better had he been a man of more tact and of a less irascible temper. But two qualifications he possessed in a high degree must be quoted in justice to him. He was both scrupulous and punctilious in the discharge his duty.

Mr. Bohun had not long been in office when he came into violent collision with Governor Blake and the Judge in Admiralty, Landgrave Morton. The matter was undoubtedly precipitated through the officiousness of the meddlesome Edward Randolph, Collector of the King's Customs in America, who was famous for making reckless charges which he could not afterwards sustain. The trouble arose through the seizing of a vessel which was condemned in the Court of Admiralty and sold as a prize. Randolph charged both Governor and Judge with corruption, declaring that Morton had refused to receive the testimony of witnesses, which went to prove that the vessel was owned by English subjects and was regular in every way. He even complained to the King that Blake and Morton were crooked in the administration

of the admiralty laws, were, in short, countenancing illegal trade, and were diverting all the revenue possible in the direction of the Proprietors. As was well known, Randolph was a bitter opponent of the Proprietary Government. He had more than once urged upon the King the necessity for the merging of all the proprietary possessions in America into English Provinces, under direct control of the Crown. The truth is, Mr. Randolph had an axe to grind in this, and one he desired should be ground to its finest edge. It was not so much the King for whom he was looking out as for Randolph. For with the Proprietors out of the way, all currents of revenue would set toward the one Royal Sea, the King's Collector receiving a full flood tide of it.

He had succeeded so far as to secure the passage by Parliament, in 1695, of an act which required the Proprietors of all Proprietary Governments to submit to the King for his approval the appointments of Governors, and no Governor was to receive his commission until he first took oath to faithfully enforce the Navigation Acts. Randolph was wiser than many of his day. He saw clearly how resistance, sure to come, to these arbitrary enactments would bring the independence of the Colonies, unless the King took matters more rigidly into his own hands. Even then there were signs on the horizon that a keen eye could not fail to read.

Thus Randolph was ever on the alert for any irregularity in the enforcement of these acts, whence the King drew his heaviest revenue from the American plantations. They were not only openly defied, but shamefully abused, he asserted. Scotchmen, Frenchmen and others, in vessels from New England and Pennsylvania, were allowed to trade, without special grant from the Crown, between the West Indies, the Carolina Colony, and elsewhere. They were allowed, too, to carry away plantation commodities without the tax being collected.

Matters now came to a clash between the

collector, the Governor of the Carolina Colony and the Judge in Admiralty. As the selling of the vessel, to which allusion has been made, involved a delicate point of the law, the matter came before the Chief Justice. He was utterly incapable of dealing with it. Had he been a lawyer of tact and ability, instead of a scholar and a dreamer, it is certain he would have found some way out, one that would at least have brought with it credit to himself. But his ignorance, as well as his punctiliousness and his quick temper, led him into grave errors, which finally precipitated him into a maelstrom of legal disaster. To add to his distress, appearances were against him in the accusation made that he had arrived at the decision finally reached through a moneyed bribe. It must have been mortifying in the highest degree to him to receive, not long after, the letter of stern condemnation from the Proprietors, which, among other words, contained the following :

" Wee can't o mitt, to tell you that you likewise have been to blame and have done things imprudently and irregularly. Wee rather that you calmly considering of what is past, should find them out, than wee be forced to tell you of them. . . . Wee would recommend to you not to shew too great a love for money which is not beautiful in any man much worse becoming a judge. Take no more than your dues and if they at present be of the least consider time will mend them; and if that don't there may be means found to doe it. The way to compass that is not by complaint or passion. When you have convinced everybody by your actions of your justice and especially if you act with prudence and temper you will gaine their love, and they will be studying to make such a man easy.

Sir your very affectionate friend,

BATH PALATINE.

This was a characteristic letter from the men who were alone to blame for the disaster that had overtaken their first counsellor. Having, out of pure niggardliness, selected for a position involving the adjustment of the weightiest legal matters a man wholly unpre-

pared to cope with them, they now, in his downfall, overwhelmed him with condemnation, then proceeded to dose him with a nauseating mixture of sentiment and goody-goody talk.

But the troubles of the first Chief Justice of Carolina came speedily to an end, so far as this world was concerned. In less than a year from the time that he had landed in Charleston, sent out, the Proprietors declared, because the conviction had seized

them that "good laws without due exercise were a dead letter," he had been called before a higher court, where it is said that justice is fully meted out to every man who deserves it. In the summer of the year 1699 "a malignant fever," afterwards known to be yellow fever, broke out in Charleston. More than one hundred and fifty victims were found within a few days. Among them were the Receiver General of the Colony and its first Chief Justice.

"ON CIRCUIT" IN ENGLAND.

BY LAWRENCE IRWELL.

FOR centuries it has been the custom of the British sovereign to commission the judges of the High Court to go to the chief towns or cities in each county to try alleged offenders and to administer justice in civil actions. The custom is said to have been introduced by the Saxon King Alfred; but it is more probable that it was first made a regular practice by Henry II., a monarch who did much to establish legal institutions and to initiate the people in the duty of obeying the law. From the time of his reign up to the present day the practice has been kept up with but very slight intermissions, and although it has undergone alterations and has been shorn of some of its pomp, it continues, and is likely to continue for many years to come.

At present England and Wales are divided into seven well-defined districts, each of which is called a "circuit;" and four times a year, one, or more, of the judges makes a visit around each district, holding court—"the assizes"—in the cities and important towns. When only criminal cases are to be tried, one judge goes to each place; but when civil cases are also to be adjudicated upon, as happens usually twice a year, two judges go, and the two courts—civil and criminal

—sit simultaneously. The judges arrange among themselves as to the circuit that each shall take, and they decide beforehand on what day the sitting of the court shall commence. The day upon which they arrive in each town is called "commission" day, because they then display their royal commissions of "oyer and terminer" and of "jail delivery."

Their arrival on commission days was, in old times, an event of no slight importance; and before the days of railroads, the sheriff, with the nobility and justices of the peace of the county, went out on horseback to meet their lordships (an England judge is "my lord"), and to escort their carriage to its destination, in a procession of much dignity and pomp. But to-day, the luxurious appearance of the sheriff's carriage and the gorgeousness of his servants' liveries form the principal feature in the pageant which conducts the Queen's legal representatives from the railway station to the residence known as "the judges' lodgings." The sheriff is a country gentleman, chosen annually, nominally by the Crown, in reality by the Lord Chief Justice. He serves, without remuneration, for one year only. All unpleasant duties are performed by the deputy-sheriff, a solicitor, who receives

a salary. The judges' "lodgings" are provided at the public expense, and are not, as a rule, used for any purpose, except the entertainment of the ornaments of the bench, who live there in retirement, broken only by attendance at the sheriff's dinner or by having some friends to dine with them. However great a "diner-out" a judge may be, when upon circuit he always refrains from accepting invitations, except to strictly formal functions given in his honor. Each judge is provided with a confidential secretary, who is called a "marshal." This gentleman is almost always a barrister, and while his duties are numerous, they cannot be called onerous. He usually sits beside the judge on the bench and makes a point of laughing at his lordship's jokes, however antiquated they may be. If the marshal performs no other service than that of keeping the judge in good-humor, he nevertheless does something towards assisting the administration of justice.

So far, I have written only of the bench. The behavior and the etiquette of the bar, however, form the most interesting part of circuit life. There is, of course, no statute regulating the manner of life of the counsel who attend the assizes; but there are unwritten laws so strictly enforced that no man who has any desire for the respect of his professional brethren, or for their society, would willingly infringe them. If one conforms to the bar rules, circuit life is in every way agreeable; but if one sets them at defiance, complete ostracism will be the result.

One of the most important rules is, that when a barrister has chosen a circuit, he is required to confine his practice to that circuit and not to go upon any other. If, for any reason, he finds the circuit he has chosen unsuitable, he may change once, but not oftener. If he goes on a circuit at all—and many barristers never do so—he is expected to choose his circuit early in his career; and he will not be elected a member of the bar mess, if he does not join the circuit within three years of his "call to the bar." Any

counsel may, however, plead in cases that are being tried upon circuits other than his own; but, in order to do so, it is necessary for him to be taken there "specially," which means that a retainer of ten guineas (\$52.50) at least must be received in addition to the usual retaining fee and daily "refresher."

The process of joining a circuit does not consist of taking any oath or making any formal judicial declaration; it merely consists in being admitted a member of the bar mess on that circuit; but it will be obvious from what has already been written that it implies a great deal more than the mere right to dine with the other representatives of the legal profession. The mode of admission to the bar mess varies considerably on the different circuits. Some form of proposal is always necessary, and on some circuits the candidate must be proposed by a Queen's Counsel and seconded by a junior. It is usual, also, on most of the circuits, to require the candidates to dine with the bar mess on three nights prior to their election, in order, I suppose, that their future associates may learn whether they would be desirable companions at table. The election takes place on what is known as "Grand Night," a night set apart during the winter and summer circuits for business and special festivity. On some circuits the merits of the candidates are discussed and the election held at a business meeting prior to the dinner, the health of the new members being drunk later on in the evening at the close of the meal, when they are, of course, required to return thanks. Upon other circuits the election takes place after dinner, a court being formed with the junior member of the bar mess as judge; the names of the candidates are brought forward by their proposers and their claims to membership are advocated; objections, if there are any, are heard, and then the judge gives his decision. Of course there is always a certain amount of paying to be done. First of all there is the entrance fee, which is never less than five

guineas, never more than ten. Besides this, the barrister must pay a fee each time he goes on circuit. On some circuits he has to pay a certain fixed sum for each city to which he goes; on others, a single payment covers all the towns he may visit. These fees are collected by "the junior" of the circuit, and are returned in a way to which objection may certainly be raised by the advocates of total abstinence. They go into the fund for which the wine treasurer is responsible, and which is expended on the purchase of wine to be consumed at the mess dinners. In England, the educated people neither frequent bars—I mean public drinking places—nor do they any longer get drunk in clubs or elsewhere. They drink with their meals, a process which enables them to consume a small amount of wine without injury to their health. A barrister who was known to be a drunkard would soon cease to have any practice worthy of the name.

The bar dinners are held each night in the respective towns during the assizes. A hotel is chosen in each place, and the treasurer of the mess keeps a stock of wine there. As a rule, the hotel proprietor has the audacity to exact six pence for each bottle of this wine which is consumed in his house. The dinners are strictly limited to the members of the mess, except upon Grand Night, when one or more visitors may be specially invited by the mess committee. Except upon this particular night, evening dress is neither required nor expected. But light colored coats or knickerbockers are objected to and will cause ostracism to the wearer.

It should be noticed that the judges do not dine at the bar mess, except upon special invitation. Upon some circuits the practice of inviting them is more common than upon others, but the frequency or infrequency of a judge's presence is, in reality, only a partial guide to his popularity with the bar, because, upon some circuits the custom is, and has always been, to give few invitations to the occupants of the bench.

The mess dinners constitute one of the most amusing features of circuit life. Barristers are a good-natured set of men, and there is, I may safely say, no other profession in which the members are upon better terms and are less envious of each other. This condition is, in my opinion, due to the division of the legal profession into two branches, the higher one still remaining distinctly a profession and not having been degraded to the condition of a trade. In New York State, of which I have abundant knowledge, practicing law is a mere business; little general or legal learning is necessary; and unprofessional conduct—to put the case mildly—is seldom punished. Incidentally, I may mention that, in England, barristers who take no part in politics have equal chances of promotion with those who are members of the House of Commons. If a man is unaffected in manner and well-behaved, he is welcomed by the bar as soon as he commences his career. It is certain, however, that overweening conceit and gross ignorance, unfortunately so common among young "lawyers" in what we call "new" countries, would not be tolerated. I may add that in no European country can a degree in law be obtained in two years.

There is nothing which develops social qualities so much as dining. Once dine with a fellow-creature, afterwards spending an enjoyable evening in his company, and dislike of him will not grow rapidly; and if a young barrister on circuit does not quickly make friends, there must be some very good reason for it. After a satisfactory dinner, accompanied by a couple of glasses of that wonderful beverage, champagne, it is difficult to avoid being agreeable, and counsel, old and young, freed for the time being from the cares and troubles of clients, and no longer burdened with the unpleasant necessity of appearing professional, proceed to enjoy themselves. Wit sparkles, jokes are made and stories are told. On Grand Night, after dinner, humorous songs are sung, often accompanied by a

chorus, which is always spirited, if not harmonious.

On all circuits there is a system of fining, but the extent to which it is carried varies very considerably. These fines are perhaps valuable for enforcing circuit etiquette, but they are much more valuable for increasing the stock of wine. Fining usually takes place on Grand Night, and the fines on some circuits are only enforced after the formality of a trial has been undergone. The acts for which a man is liable to be fined are numerous and many of them are amusing. For example, if a counsel be appointed a recorder or a revising barrister, he is usually fined two or three guineas, these being serious offences. Getting married is a less serious offence. Upon the birth of a son a penalty is usually exacted.

The etiquette to be observed on circuit is by no means elaborate. A man is expected to behave as a gentleman and to do nothing *outré*, in any way. One rule that is enforced with great stringency is that barristers staying in hotels must not make use of the public rooms, for the reason, it is said, that they might meet in those rooms the solicitors, witnesses and others who are connected with the cases to be tried. It might eventually lead, it is supposed, to "touting" for business, a practice against which all bar etiquette is opposed. Although barristers may not use the public rooms, it is not by any means usual for them to require anything except a

bedroom. The hotels, however, often set apart special rooms for the bar, and in one of these breakfast is served. In using these rooms the junior members of the bar become better acquainted than they can become in any large city, under ordinary circumstances. Every member of the bar mess, be he an over-worked and eminent Q. C., or a briefless junior, is presumed to be upon an equality with every other member, and in addressing each other such terms as "Sir" and "Mr." are always omitted.

Circuit life is undoubtedly pleasant. Besides the change of scene, the barrister is able after the court closes, or earlier if he is not employed, to explore the country and enjoy the beauty of the scenery and the fresh country air. He is not even incommoded with a silk hat, which, although indispensable in London, is seldom seen on circuit. The social clubs in the assize towns are often thrown open for the time being to the barristers, and they are welcomed alike to public and private hospitality. These, of course, are advantages which the unemployed reap to a much greater extent than the busy men. They, however, find one great advantage on circuit, and that lies in the fact that all fees are paid at once, and there is none of that weary waiting which counsel find so exasperating in large cities. If, then, a barrister's work prevents his enjoyment of the festivities of circuit life, he is, nevertheless, recompensed in a tangible manner, without delay.



HOW SCIENCE MODIFIES LEGAL PRINCIPLES.

A TREATISE on the law of evidence, of the imprint of 1800, would in an hundred instances need correctional notes for a new edition as to doctrines novel and indeed startling, of recent enunciation; and none so emphatically as in regard to the inroads which the progress of science has made upon old legal principles. When half a century ago photographs were allowed to be placed in evidence as aids toward, or in verification of, identity, and when the newly invented word telegram came under the eyes of testimony as a judicial exception to the rule concerning hearsay evidence, many veteran lawyers shook their heads negatively and perhaps forebodingly. When chemists and other experts usurped the functions of jurymen in deciding weight of poisonous circumstances, or of handwriting or of insanity, challenges to the propriety of such innovations became rife in the profession. But stranger innovations seem impending. What for instance do octogenarian lawyers think of making affidavit by telephone with an affiant thousands of miles distant from the scrivener who is to prepare the deposition and from the notary who administers the oath over as many miles of magnetic wires? That procedure has been sanctioned in Supreme Court Chambers at New York City by Justice Beekman. A plaintiff residing within the New York jurisdiction named Rothier held a claim for moneys had and received against a Cincinnati broker named Altenburg, with opportunity to attach in New York certain property belonging to the latter. But the plaintiff was absent from New York and only he could execute the necessary moving affidavit. In this dilemma, and fearing that the attachable property might be removed from jurisdiction before plaintiff returned *in propria persona*, the absent plaintiff's attorney bethought himself of telephonic

use. He caused over the long-distance telephone the plaintiff to be summoned to the Cincinnati end of the instrument, and over it to dictate a deposition. A notary was with the plaintiff's attorney at the New York end of the telephone. Both attorney and notary could recognize and knew the plaintiff's voice. The ordinary telephonic call and salutations were had. "You are Mr. Rothier," calls the notary, and answer came, "I am." The notary then administers the oath, and the plaintiff holding in his hand a Bible repeats it and kisses the book. Then the plaintiff, with mouth to the Cincinnati transmitter, to his attorney, with ear at the New York tube, recites a short affidavit, and sentence by sentence the attorney repeats it to a stenographer, who writes it all down and then it is moulded into an affidavit by the attorney, who swears to its contents on information and belief as derived that day from an orally sworn statement of the plaintiff made to him. Upon this affidavit, which further affirmed the voice in Cincinnati to have been that of the New York residential plaintiff, the justice issued a warrant of attachment on the moneys in New York belonging to the Cincinnati defendant.

The next innovation may be a dying declaration in a murder case talked in presence of witnesses into a phonograph, from which to be repeated to a jury. Perhaps, too, kineoscopic pictures, taken by policemen during a riot or by a friend of a beaten wife during an altercation with the brutal husband, may be admitted in evidence. X-rays may also come into court under many circumstances, and become pretexts for deciding controverted facts; so that the chapter upon hearsay in the treatises of Greenleaf or Taylor may have to be re-written. Science having had its innings in religious matters, can also play games with legal doctrines.

THE SPIRIT OF THE ROMAN LAW.

BY GUSTAVE RAVENÉ.

THE historical study of law must be based on philosophical considerations. It must start from the premise that law is not an accidental or arbitrary institution among men, a necessary evil, a convenient arrangement serving some social expediency; but that it has its inner reason in the very nature of man, that it forms a part of his moral nature and constitutes an important factor in his social existence. The realization of the idea of justice belongs as much to the progressive evolution of humanity as does the development of the ideas of religion, morality, etc. Hence law, as a part of human social life, is closely connected with the entire intellectual formation of the human species. The general height of the intellectual development of mankind is the standard of measurement for the relative position of their legal ideas.

The proper formative sphere of law is the national life. Law is a social institution, as such part of the national life of the race or nation, and, therefore, it must be different among different peoples. The very conception of law being uniform and general for the whole of mankind, the question has often been asked, Whence arises the diversity of laws among different nations? The reason for this diversity has been sought in all kinds of external or accidental phenomena. But a deeper reason underlies this variation. The whole process of human development does not proceed in an abstract uniformity or by the collective activity of the species, but it observes an arrangement in accordance with the separation of mankind into races, nations or tribes. Accordingly, physical and intellectual factors being different, there is necessarily a variation in the essential phenomena of their social life as well as in the general directions of their intellectual and moral de-

velopment. Peoples, which by descent, adaptation, character or language, are united in particular nationalities, form the smaller units in which the general existence and the intellectual, moral and social characteristics of the whole species are developed. The development of all human ideas in religion, morals, art, science, takes place in every particular people and thus is tinged with its peculiar national character. It cannot be otherwise with law. In every people the social life in morals, customs and intercourse, develops itself in accordance with its individual nationality, and, accordingly, the conceptions of the legal order of life are, in every nation, developed in the national direction of its intellectual and moral existence; and, necessarily, in different manners by different nations. Therefore every popular law must have a national character, and, indeed, it will give the best representation of the intellectual and social conditions prevailing in the nation. The idea of an abstract universal law or universal state is in contradiction to the anthropological organization of the human species. But the unity of the legal idea does not therefore, disappear, as little as the unity of the human character is lost among the different races. The differentiation and inter-relation of races and peoples, which shows itself in language and nationality, repeats itself in legal institutions. There are wider and narrower circles of related laws, but in all is the universal fundamental legal idea the starting point and generating power.

With this national formation of laws is given the idea of their historical development. The separate popular laws, like the peoples themselves and their social and intellectual conditions of existence, are not absolute quantities, but separate ephemeral phenomena, in the great stream of history, and wherever a

historical development of the national life takes place, it must necessarily include the legal life as an integrating factor. Like every nation, every epoch must have its distinctive laws. Only, here we must remember that the law as a fixed social order with its lasting institutions, does not participate in every oscillation of popular life and change in intellectual attitude, but very often accommodates itself only to the changes of condition when they are actually accomplished and very often opposes to them a tenacious resistance. In this case, law may justify the words of Mephistopheles in Goethe's "Faust":

Es erben sich Gesetz und Rechte
Wie eine ew'ge Krankheit fort;
Sie schleppen von Geschlecht sich zum
Geschlechte,
Und rücken sacht von Ort zu Ort.

But at length the dead system must collapse. On the other hand, the law may be in advance of the national life, as when the legislation recognizes the directions and needs of the time and shapes the law accordingly. Every actual law therefore is the result of the past and only to be recognized by it, but it also includes more or less of the germs of the future. The history of the law among the different nations in this manner forms a part of their history especially of the history of culture, and as the history of the various nations forms a universal history, so does the history of law among these peoples produce a universal history of law.

From the above outlined ethnologic-historical conception of law, we may conclude that the differences and changes in the legal life of nations do not arise from the capricious play of chance, but that they are founded in an inner natural necessity. It is a *naïve* childish belief that law is made by kings and that they change it according to their pleasure. The individual, even the ruler, is a child of his people and of his time and cannot break through the barriers thus set to him. The higher or lower level of development occupied

by a people, and the rising and sinking of its intellectual power are functions of relations and circumstances entirely beyond the control of individual man. The freedom of action and legislation, their merit or guilt, is not thereby annulled; and as little can the idea of necessity or compulsion be violated in order to influence the judgment of worth or worthlessness of existing institutions and to limit the endeavor for their change or removal. The border line between freedom and compulsion and how far the individual is acting or compelled, is hammer or anvil, can be as little indicated in the formation of law as in other human actions.

Another question is, whether the legal evolution of individual nations and the different levels thereby attained, is to be regarded as a connected historical development of the law — or rather of the spirit of the law — in which the necessary lower steps for the next higher step is formed by every people; or whether the law in its development is not to be regarded as a collection of more or less prominent phenomena of human character, ripe or unripe fruits of the human intellect. The former view is that held by Hegel, and we are indebted to it for the first general points of view for a conception of the different legal systems. On the other hand, the differences in law is not explained by a mere game of chance. It is the consciousness of right which shows itself in them, its elements furnish the base for the various legal formations, and only the one-sided predominance of one or the other element in the idea of right produces the main differences in legal systems. Thus far a definite principle and system is at the base of the various phenomena in history. The individual, popular legal systems, while they are but slightly connected in their historical development, are logically in definite relations to each other, and the universal history of law is not a mere registering and enumeration of endless varieties of an idea, but it is the representation of the evolution and development of the legal con-

sciousness in human kind. Generally speaking, the connection of ideas is about as follows :

Freedom and compulsion are the fundamental elements of law. The subjective right is freedom, the objective represents compulsion. Both are, in their conception, indissolubly connected, one cannot be derived from the other. But in the historical development of law, one or the other may predominate in the national legal consciousness and give a one sided initial starting point for the formation of law. Herewith the fundamental difference is given for the entire legal system. Asia and Europe are the countries in which the laws are thus differentiated. Asia is the land of compulsion and objective law, Europe that of freedom and subjective right. The other continents do not, individually, come into consideration. They have derived their laws from the two others; or, where an indigenous system prevails, it is yet on the level of a first formation of law.

In Asia the law appears as objective power and necessity towards the individual. It is a higher order of life to which the individual must submit. It grants him a certain measure of freedom and subjective right, but it has its base and origin, not in the liberty and rights of the individual, but in the objective command from above. Subjection, not freedom, is the basis of the law. According to the source of the objective command the following differences may be noted: In the oriental countries it is the will or command of the ruler which forms the principle of the law, of whatever nature the power of the ruler may be; he may have a patriarchal family power, as in China, or be absolute despot, in which case the whole people appear as slaves, as in farther India, especially Siam. In central Asia, principally India, the law rests on the moral religious order which the priests, the Brahmins, have given to the people. In western Asia, it is the command of the founder of the religion, who at the same time with the creed ordains the law; as is the case among the ancient Persians, the Jews and the Mohammedans. It was

Christianity which produced a separation of religion and law and made possible a union of both with freedom.

The European legal systems rest on the principle of individual liberty. Right and law are not given by rulers or priests but emanate from the people and are incorporations of its liberties. In the Greek laws, subjective and objective right were in an immediate union; freedom consisted mostly in the general participation in public life; the private law was subordinate and had not yet arrived at any development. The equal development of public and private law, or of objective and subjective right, appears for the first time in the Roman and Germanic laws. These two legal systems represent the advanced parts of legal development combined; they are its completion, and therefore are the basis for the whole modern law of the civilized world. Both rest on the liberty of the individual, but the difference between the two may be stated to be as follows :

In the Roman law the individual liberty and its legal expression appear as an abstract objective conception shared by every individual. Right is thus conceived objectively and legally and equally determined for all, so that all are measured by the same standard and equally judged. To the Romans it appeared as the highest duty of legislation, fulfilled by the XII Tables, "*omnibus, summis infinisque, iura aquare.*" All law therefore emanates from the individuals, has their subjective rights for a basis, and their recognition and protection as an end; but it only becomes actual law when it is established in an objective, all-ruling form; in whatever manner this may be effected, whether by law or custom, or by the action of magistrates, jurists or emperors. A firm and absolute governmental power as a general bearer of the objectivity of right, is essential to the Roman law. But this state itself rests on the subjects, and—during the republic and by themselves—was formed by means of the peculiar firm organization of the body of the citizens and their rule over subjugated peoples. With the corruption of this body and the extension of the civil law, this

relation could no longer be maintained and the objective power in the State was therefore grasped and absolutely maintained by one person. The emperor appears as the incorporated popular will. He is a despot, but not like the despot of the Orient, for he is the bearer of the *potestas* and *maiestas populi*, and he has to see to the maintenance of the rights of all. With the introduction of Christianity a new principle was given to the imperial power: that of the divine right of kings. With this the antique Roman life is discontinued, the old principle of freedom and equality in the empire, and also in the law, disappears, the despotic Byzantine differentiation into castes is introduced, and the whole Roman system approaches its end.

In the Germanic laws, liberty appears as the subjective freedom of the individual; it is his own act; every one has as much liberty as he can obtain and keep for himself. There is no objective, abstract and equal standard of measure for the liberty and right of the individual; there is no objective unity of the state, as in the Roman law, by which the rights of all are determined and preserved. The objective law lives only in the consciousness and testimony of social associates and is protected by them. Individuals group themselves according to their peculiar conditions in life, either according to the social scale of feudal and peasant rights, or by corporations into communities and guilds. The state is only the aggregate of these subjective formations and unions. Accordingly every rank has or creates its own laws by decision or custom. The general abstract law has only a small sphere for its action. General enactments concerning the law do not exist, neither do general courts; every sphere of life has its own law and also its own proper court. The organic elements of the social life, estates, communes, corporations, the incidents of landholding, the separation of religion and state were carried to a degree of development of which no trace is to be found in the law of Rome. On the other hand, the objective unity of the state and the universal liberty and general privi-

leges of the individual, rights which must form the basis of particular privileges, were entirely lost in this subjective creation. The one-sidedness of the feudal and corporate state at length, towards the close of the middle ages, appeared in a perfectly untenable manner and led to a reaction in the direction of the Roman objective state unity. A fusion of the objective Roman legal and state principle with the subjective Germanic idea, was necessary for an organic formation of the legal life and the development of the state. This fusion connects the middle ages with the modern world. In different countries the transition took place in different manners. In France the objective element was adopted by the kings and carried through by force and cunning; the republic and empire then completed this Romano-French absolutism and centralization. In Germany the subjective elements of the particular peoples and states retained their preponderance; the legal unity was effected by the reception of the Roman law, but the universality of the empire was destroyed and the principle of the modern state was developed in the variegated and unsatisfactory form of the small states. All these individual formations secured the independence of the members, but the unity of the nation was not entirely lost in the popular consciousness, and has in the new German empire received its modern form, assuring not only the right and power of the unity, but also protecting the independent existence of the various countries and peoples composing it.

The importance of the Roman law rests mainly on the fact that in it has been developed the abstract conception of subjective right; in other words, the universal equality of the rights of the individual in the sphere of private law. In this is contained what is called the universal character of the Roman law. This is not to be construed in saying that the Roman law is the eternal, absolute law for all peoples and all times, or even that a modern nation may need no other law, but

it must be understood as meaning that in the Roman law is found an essential and universal element of law, which must exist in every legal system and must also be its base; and the idea of this element has been so completely developed in the Roman system, that the law of Rome is the theoretical and practical model for the laws of all peoples and all times.

The evolution of this universal character is in the closest connection with the development of Roman history. It has only become possible by the fact that the Roman state became a world state, embracing the most different peoples. This universal element of the Roman law is not to be regarded as a simple union of all the different laws and a

merger of the proper Roman law. The unity and centralization in the evolution of the law was retained even more tenaciously than in the formation of the political rule. It is true that the useful elements were extracted from all laws, but only to be moulded into Roman law, to change them according to the Roman spirit and into Roman forms and then to diffuse this system over the world as specifically Roman law. From this peculiar process of assimilation we may explain the fact, that the Roman law, in its latest and most universal development, has retained the spirit and form of its fundamental character and shows all the traces of its ancient institutions.

THE ROYAL ASSENT.

THE sittings of both Houses were temporarily suspended in order to allow time for a Queen's messenger to proceed to Osborn to obtain the Royal Assent to the Appropriation Bill. Her Majesty's assent was telegraphed to Westminster, and at the re-assembling of the Houses the Queen's Speech was read, and Parliament prorogued with the usual formalities.

Such is an announcement which appeared in the English daily papers at the close of a recent session of Parliament; and to those who are unacquainted with British parliamentary procedure, a few words in reference to the practice that prevails regarding the assent of the monarch may be of interest.

In the first place, every bill, whether it be a public or a private one, that has passed through all its stages in both Houses must, before it can become a law, receive the Queen's assent. Prior to the reign of Henry VIII. this assent had to be given in person; but by an act passed in that king's reign,

enabling the assent to be given by Commission, signed by the royal hand, this necessity was dispensed with. When the assent is given in person, the Clerk of the Parliament waits upon Queen Victoria in the robing-room before she enters the House of Lords, reads a list of proposed statutes, and receives her commands upon them. When Her Majesty is seated upon the throne, the Clerk of the Crown reads the title of each bill; the Clerk of the Parliaments, if it be a public statute, then signifies the royal assent in Norman-French as follows: "*La Reyne le veult.*" (The Queen wills it so to be.) If the bill be a private one, the form of assent is, "*Soit fait comme il est désiré.*" (Be it as it is desired.) When, however, a bill of supply is passed, the assent is expressed thus: "*La Reyne remercie ses bons sujets, accepte leur benevolence, et ainsi le veult.*" (The Queen thanks her loyal subjects, accepts their benevolence, and wills it so to be.)

Money bills, known as "supply," do not require the attention of the House of Lords in any shape or form. After each declaration by the Clerk, a gentle inclination of the head is given by the Queen, indicating her assent. If, upon the other hand, the royal assent were to be refused, the Clerk would say, "*La Reyne s'avisera.*" (The Queen will think about it.) This sentence, however, has not been made use of since the time of Queen Anne, as I propose to explain.

When the royal assent is given by Commission, the Lords Commissioners read the Commission and exactly the same formality is observed as if the monarch were present.

Before proceeding further, it may be well to note that at the time of the Commonwealth, Cromwell's assent to statutes was given in English, but at the Restoration, the old form of words, in vogue since the reign of Henry VII., was resorted to, and only one attempt has since been made to abolish it, when, in 1706, the House of Lords originated and passed a bill to abandon the use of the French tongue in all parliamentary proceedings; this bill did not pass the House of Commons, and the ancient custom of giving expression to the royal assent in Norman-French seems likely to continue for an indefinite period.

There have been occasions, though not many, on which the royal assent has been refused. Indeed, if bills were vetoed in Britain as often as they have been by some United States Presidents, the chances are that the people of "the tight little isle" would long ago have abolished the system of monarchy. It is recorded in the Journal of the House of Lords that the prerogative of refusing assent was exercised by Queen Elizabeth at the close of the session in 1597; and the refusal extended to no fewer than forty-eight bills. Again, in 1692, William III. refused to sign an act for the establishment of triennial parliaments. He was, however, induced some two years later to allow the bill to become law by giving his assent

in the usual manner. As has already been mentioned, the last occasion upon which the royal assent was withheld was in 1707, when Queen Anne declined to sign a bill entitled, "An Act for settling of the militia of the part of the Kingdom called Scotland." A hundred years later, when Lord Howick (afterwards Earl Grey) introduced a bill to allow Roman Catholics to serve both in the army and navy, it is said that George III. strongly intimated that he would rather abdicate than give his assent to such a statute, because he considered that his coronation oath prohibited him from admitting Catholics to any office in the State. When, at length, in 1829, the act had passed both Houses, George IV. at first refused his assent to it, but yielded on learning from Lord Eldon that the withholding of the assent would involve the resignation of the Cabinet. Sir Archibald Alison, the historian, deals with the matter in touching detail, showing the agony of mind of the King during the progress of the measure through Parliament, and concludes his account by saying, "Such was the despair of the King that the unhappy monarch threw his arms round Lord Eldon's neck and wept, entreating him not to desert him, for he had no other to advise with."

Circumstances have arisen when the strict formula observed in reference to obtaining the royal assent has necessarily been abandoned, as at the passing of the Regency Bill in 1811, when the assent to the measure was obtained under peculiar circumstances. The King (George III.) being insane and incapable of exercising any authority, the Great Seal was nevertheless affixed to a Commission for giving the royal assent. Again, in 1830, when it became painful to George IV. to sign with his own hand, recourse was had to a special statute, passed for the purpose, by which he was enabled to appoint one or more persons with full power and authority to each to affix, in the king's presence and by his command, the royal signature by means of a stamp made for the purpose.

A curious instance is on record of the royal assent having been given to a bill by mistake. This is said to have occurred in 1844, when one of two railway bills, which had not passed through all its stages in the House of Lords, by an accident, received the assent intended for the bill which had complied with all formalities. This strange oversight necessitated the passage of a special statute to rectify matters.

It is not generally known, even in England, that in 1876, when the Queen was about to visit the continent of Europe, some doubts were expressed as to whether she could legally give her consent to bills by Commission during her absence. No case could be found in which the assent had been so given, but it was ascertained that during the reign of William and Mary this contingency had been provided for to the effect that "nothing should be taken to exclude or debar His Majesty from the exercise of any act or royal power, but that every such act should be as good and effectual as if His Majesty were within the realm." Queen Victoria was, therefore, advised that she would be able to give her assent to bills while absent from the United Kingdom, and several acts received the royal assent under these unique conditions.

A few remarks as to the "omnipotence" of the British Parliament may not be out of

place here. First, the word Parliament includes the Sovereign, the House of Lords and the House of Commons. In many countries, including British colonies, the legislature is a limited body, which exercises the powers conferred upon it by a written constitution; its acts are void if they exceed its powers. The Parliament of the United Kingdom, upon the other hand, defines its own powers and is not bound by any written constitution. No law court can revise its acts of any kind whatsoever. In the words of Sir Edward Coke, the power of Parliament "is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds." The Septennial Act (1714), which limits the life of a Parliament to seven years, illustrates what is meant by the omnipotence of the three bodies which constitute the British government. A House of Commons, elected for three years under the Triennial Act of 1694, concurred in prolonging its own mandate to a period of seven years; and its action was perfectly legal and constitutional. Whether the United Kingdom, and the British Empire generally, would benefit by bringing the powers of Parliament within legal bounds by substituting a written constitution for an unwritten one, is a question upon which the writer dare not venture to express an opinion.



The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

FACETIÆ.

A GENTLEMAN who had a suit in chancery was called upon by his counsel to put in his answer, for fear of incurring a contempt. "Well," says the client, "why is not my answer put in then?" "How should I draw your answer," saith the lawyer, "without knowing what you can swear?" "Hang your scruples," says the client again; "pray do your part of a lawyer, and draw me a sufficient answer; and let me alone to do the part of a gentleman, and swear it."

AN eminent judge of the C. P. Four Courts, having been called on at a public dinner for a song, regretted that it was not in his power to gratify the company. A wag who was present, observed that he was much surprised by the refusal of the learned judge, as it was notorious that a great number of persons had been "transported by his voice."

A GOOD story is told of one of the justices of the United States Supreme Court. He was trying to get into his gown and Mr. Justice — was assisting him. His hand in some manner got caught in the robe and the gown stuck. "Hang it!" he exclaimed. "The devil's in the thing." "Oh, no," said Justice —. "You have n't half got into it."

JUDGE (to prisoner who has been captured in a raid on a gambling house): "What is your occupation?"

PRISONER: "I am a locksmith, your honor."

JUDGE: "How did you happen to be found in a gambling house, and what were you doing when the police appeared?"

PRISONER: "I was making a bolt for the door."

At one time it fell to the lot of Lord Morris to hear a case at Coleraine, in which damages were claimed from a veterinary surgeon for having poisoned a valuable horse. The issue depended upon whether a certain number of grains of a particular drug could be safely administered to the animal. The dispensary doctor proved that he had often given eight grains to a man, from which it was to be inferred that twelve for a horse was not excessive.

"Never mind yer eight grains, docther," said the judge. "We all know that some poisons are cumulative in effect, and ye may go to the edge of ruin with impunity. But tell me this: The twelve grains — would n't they kill the divil himself if he swallowed them?"

The doctor was annoyed and pompously replied, "I don't know, my lord, I never had him for a patient."

From the bench came the answer, "Ah, no, docther, ye niver had, more's the pity! The old bhoy's still aloive."

NOTES.

PETER THE GREAT was opposed to litigation. He issued an edict that no trial should last to exceed eleven days.

A LAWYER making his will bequeathed his estate to fools and madmen, "for," said he, "from such I had it, and to such I give it."

HARGRAVE, the English commentator, is credited with having said: "Any lawyer who writes so clearly as to be understood is an enemy to his profession."

IN the reign of Henry IV., courts were held at Dorking every three weeks, and there are instances of suits lasting six months, and resulting in damages of four pence and costs of twelve pence.

EUROPEAN civilization may have wrought changes, but up to a few years ago the Chinese code was so simple that the services of attorneys were not necessary, and there was not a lawyer in the whole empire.

SOLON compared the people to the sea and the lawyers to the wind. "The seas," he said, "will be calm and quiet if the wind does not trouble."

NUMEROUS instances are given of the power that Mr. Rufus Choate possessed over a jury, concealing it even at the time he was exercising it with the most potent effect. Mr. E. P. Whipple instances two notable cases of this kind. One resolute jurymen said to another, as he entered the "box:"

"Now, mind you, there is one man in this crowd who will not give a verdict for the client of that man Choate. Why, sir, he is the great corrupter of juries. I know all his arts. He is engaged by fellows who wish to subvert justice between man and man. I hate him with my whole heart and soul!"

When the verdict was given for Choate's client, with hardly a discussion in the jury-room, the wonder was expressed that this obstinate member of the conclave agreed so readily with the rest.

"Oh," he said, "the case was a plain one. Choate was right this time; and you know it would have been scandalous for me to violate justice because I had a prejudice against the person who supported it. Let him appear before us in a case where he is palpably wrong, and I will show you that I am all right. He never can humbug me!"

On another occasion a hard-headed, strong-hearted, well-educated farmer was one of a jury that gave five verdicts in succession for Choate's clients. He said:

"I did not think much of his flights of fancy, but I considered him a very *lucky* lawyer, for there was not one of those five cases that came before us where he was n't on the right side."

WHAT astonished me most was a visit from the "head-thief" on my arrival at Chungking, in 1880. Of course I asked for explanations, and was informed that, for a payment of a dol-

lar a month by way of insurance, the thieves would not molest me. It was the city magistrate's own policeman who volunteered this information. I remember, too, one day at the Peking Legation, in 1871, an old Chinese writer asked us to send a note in the minister's name to the Foreign Office, and get that august body to move the governor of Peking to return a pair of crystal spectacles which an unknown thief had snatched away from him in the street that morning. The old man insisted upon it that it was quite the right thing to do, and that there was no chance of failure; he added that the custom was for all recognized thieves to hold their plunder at the order of the police for a few days, in case any influential person should ask for it. With the minister's consent a note was sent, and, sure enough, the captain of gendarmery returned the spectacles next day, adding that his men had succeeded in apprehending the thief, who would be bastinadoed.

I remember one case where a salt junk and cargo had been wrongfully seized and sold. The Chinese took very high and mighty ground, and stoutly swore the junk lay a mile beyond foreign waters. At the last moment an irrefragable proof of this wrong accidentally turned up in the shape of the slipped anchor, and it was privately arranged with the salt commissioner, in order to "save the viceroy's face," that another junk of the same kind should be bought, filled with salt, and unofficially handed over to the authorities, who, on their part, agreed to allow the viceroy's dispatch to stand, officially asserting the unjustifiable nature of the junkman's demands. — *Contemporary Review*.

An old graduate of the Harvard Law School was remarking the other day upon a "curious piece of forgetfulness in dear old Professor Washburn's admirable work on Real Property." The author begins a chapter on Dower at page 184 of the 4th edition. He discusses the Nature and History of Dower, then proceeds to tell us of what a widow is dowable, and to set forth the Requisites of Dower. In this examination the author covers over no less than thirty-one pages before he gives the slightest hint of a definition of dower at common law. On page 215 occurs the first intimation that the widow holds an estate for life. The oversight grows

out of the fact that Professor Washburn contented himself with saying at the start that "Dower is the provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children." He forgot to go further and say of what that provision consisted. The book is a monument of faithfully wrought out material, well brought together, and the profession owes him grateful thanks for his labor. Peace to the memory of the good Professor.

We quote the following from an entertaining Irish author:

"One of the devices to prevent the accumulation of petty larceny in the Court of Common Pleas of Ireland was very amusing. Lord Norbury's register, Mr. Peter Jackson, complained grievously to his lordship that he really could not afford to supply the court with gospels or prayer-books, as witnesses, after they had taken their oaths, were in the constant habit of *stealing the book!* 'Peter,' said Lord Norbury, 'if the rascals read the book, it will do them more good than the petty larceny may do them mischief.' 'Read or not read,' urged Peter, 'they are rogues, that's plain. I have tied the book fast, but nevertheless they have contrived to loosen and abstract it.' 'Well, well,' replied my lord, 'if they are not afraid of the *cord*, hang your gospel in *chains*, and that, perhaps, by reminding the fellows of the fate of their fathers and grandfathers, may make them behave themselves.' Peter Jackson took the hint; provided a good-looking, well-bound New Testament, which he secured with a strong jackchain that had evidently done duty before the kitchen fire, and was made fast to the rail of the jury-gallery. Thus the holy volume had free scope to swing about and clink as much as it chose, to the great terror of witnesses, and good order of the jurors themselves."

DR. GARTH, alluding to the practice of lawyers; wrote:

For fees, to any form they mold a cause,
The worst has merits and the best has flaws;
Five guineas make a criminal to-day,
And ten to-morrow, wipes the stain away.

IN the rolls of the British Parliament, 1545, is a petition from two counties setting forth that

the number of attorneys had lately increased from six to twenty-four, whereby the peace of those counties had been greatly interrupted by lawsuits. They asked that the number be reduced to fourteen.

ADDISON tells a story about the Neapolitans, who were much given to litigation. One of the popes made a requisition upon the viceroy of Naples for 30,000 head of swine. The viceroy replied that the swine could not be spared, but if his holiness had any use for 30,000 lawyers they were much at his service.

LITERARY NOTES.

IN the INTERNATIONAL MONTHLY for October Senator Hoar, one of the staunchest of Republicans and partisans, writes upon "Party Government in the United States and the Importance of Government by the Republican party." This essay is a brilliant defense of Republican principles and the integrity of Republican rule. As should be expected Senator Hoar looks with great apprehension upon Democratic policies and leaders. He is very outspoken in his treatment of Independents and of the Philippine policy of the Republican party, and considers the latter the one grave mistake of this party. The Senator vindicates his own position concerning the Philippine policy and his party's demands. "The Expansion of Russia," by the great historian, Rambaud, is concluded and presents in a most expert and authoritative manner Russia's policy with China and Japan. After reading this paper one is apt to regard Russia's aspirations of influence in China more kindly than otherwise. Her policy has been consistent and successful. Other articles are "The New Italy," by Salvatore Cortesi of Rome, correspondent of the London Daily News, "Recent Progress in Geology," by Prof. Lawson of University of California, and "Primitive Objects of Worship," by L. Marillier of Paris.

WITH its November issue, THE CENTURY MAGAZINE begins a year of romance, during which many of the most famous living writers of fiction will contribute to the magazine short stories, novels or novellettes. The reception accorded "The Helmet of Navarre," begun in the August number, indicates that the proposed departure will be a popular one, and with such names to conjure with as Rudyard Kipling, Mrs. Burnett, Bret Harte, Lew Wallace, Weir Mitchell, Miss Wilkins, Winston Churchill, Howells, James Harris, Cable, Stockton, Page, Anstey, and Ian Maclaren — to note but these few —

the conductors of THE CENTURY are pretty sure to meet the tastes of all lovers of fiction.

In the October REVIEW OF REVIEWS, the editorial department entitled "The Progress of the World" contains an impartial review of the Presidential campaign down to its present stage, special attention being given to the letters of acceptance of the several candidates. Other topics editorially treated in this number are the Galveston calamity, the coal miners' strike, the pending elections in England, and the problem of reconstruction in China.

WHAT SHALL WE READ?

*A Breaker of Laws*¹ depicts the struggles of a man to throw off the effects of evil associations, but having once entered on a criminal career he finds the breaking away from his old habits of life an impossibility and is finally caught in the toils of the law. The story is admirably told and is pathetic in the extreme.

The scene of *The Black Gown*² is laid in and about Albany, N. Y., during the struggle between the French and English. The story abounds in exciting adventure, and the reader's attention is closely held to the very end. We commend it as a most excellent book for whiling away a leisure hour.

Miss Hurd, a new writer for girls and young women, gives us, in *The Bennett Twins*,³ a story which is bound to make a decided hit. She relates the experiences of a brother and sister, who determine to strike out for themselves, the one as an artist and the other as singer, and does it in a manner which reminds one of Miss Louisa Alcott at her best. The book is really a capital one and will delight old as well as young readers.

No writer has done more for the service of his country than Samuel Adams Drake in his books on colonial history, and the new edition of his *Old Landmarks of Boston*,⁴ will be heartily welcomed. Mr.

¹A BREAKER OF LAWS. By W. Pett Ridge. The Macmillan Company, New York. 1900. Cloth. \$1.50.

²THE BLACK GOWN. By Ruth Hall. Houghton, Mifflin & Company, Boston and New York. 1900. Cloth. \$1.50.

³THE BENNETT TWINS. By Grace Marguerite Hurd. The Macmillan Company, New York. 1900. Cloth. \$1.50.

⁴OLD LANDMARKS AND HISTORIC PERSONAGES OF BOSTON. By Samuel Adams Drake, author of "New England Legends," etc. New edition, uniform with "Historic Mansions and Highways around Boston." With 93 illustrations in the text and numerous plates. Little Brown & Co. Boston. 1900. Crown 8vo. \$2.50.

Drake has been for several years accumulating materials for a thorough revision of the work. Besides numerous alterations in the text, designed to keep pace with the march of improvement, the opportunity has been availed of for the introduction of new and interesting matter. A number of full-page illustrations not found in earlier editions have been added, including a rare picture of Boston in 1830; the daring feat of Isaac Harris in saving the Old South from the flames; Boston Common as a cow pasture, with the Great Elm; Old Concert Hall, The Almack's of Boston; State Street in 1825, etc.

In a volume entitled *Social Justice*,⁵ Professor Willoughby discusses the industrial question applying the principles of justice to the concrete problems of our social life. His subject he groups under two heads: the proper distribution of economic goods, and the harmonizing of the principles of liberty and law, of freedom and coercion. The problem which he seeks to solve is one of the greatest importance, and his work will be read with interest by all thoughtful men.

NEW BOOKS FOR LAWYERS.

NOTES ON THE UNITED STATES REPORTS.

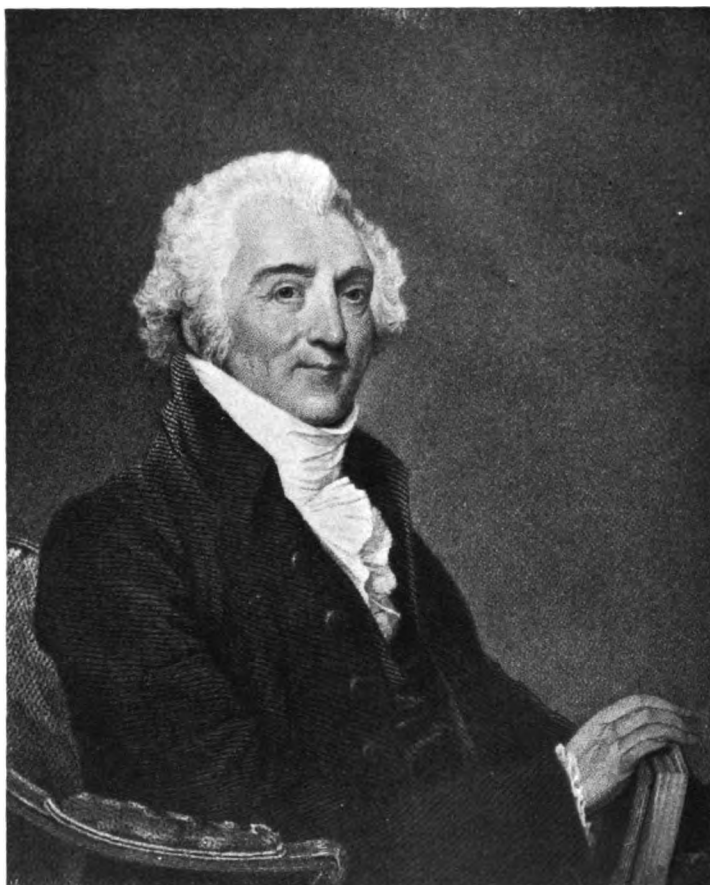
Book 8. By WALTER MALIUS ROSE of the San Francisco bar. Bancroft, Whitney Co., San Francisco. 1900. Law sheep. \$6.50.

With each new volume we become more and more impressed with the value of these "Notes" to the practicing lawyer. No member of the legal profession, who can afford to take the series, can afford to be without it. The present book covers cases in 17-23 Wallace, 91-93 United States.

THE AMERICAN STATE REPORTS, Vol. 73, containing the cases of general value and authority decided in the courts of last resort of the several states, selected, reported and annotated by A. C. FREEMAN. Bancroft-Whitney Co., San Francisco. 1900. Law sheep. \$4.00.

For the practitioner who desires to keep up with the latest decisions upon important points of law, this series of reports is invaluable. Mr. Freeman displays admirable judgment in his selection of cases, and his annotations are unusually full and instructive.

⁵SOCIAL JUSTICE. A critical essay by Westel Woodbury Willoughby, Ph. D. The Macmillan Co., New York. 1900. Cloth. \$3.00.



James Sullivan

The Green Bag.

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JAMES SULLIVAN.

GEORGETOWN, in the District of Maine, was incorporated by the legislature of Massachusetts in the year 1718. It embraced the territories of the present city of Bath and the town of Phippsburg, on the west side of the Kennebec (or Sagadahoe) River, and, on the east side, the present towns of Woolwich, Arrowsic (island), with Parker's Island, — the latter now alone constituting the entire territory under the name of the original corporation.

The Popham Colony, in 1607, formed the first settlement within its limit; but this was abandoned in the year following, and the next settlement of note was made in 1650 by people from the western colonies. From this date the number of inhabitants slowly increased until the Indian Wars broke out in 1675, driving the entire population to the seaward islands, or entirely out of the region.

Parker's Island (now bearing alone the name Georgetown) contains about 28,000 acres of land and salt marsh, and was occupied by some sixty families when James Sullivan came there to reside, and, if possible, to practice his profession of law. He had just completed a two years' course of study with his brother, subsequently Major General in the Army of the Revolution.

Between the western limits of Georgetown and Falmouth (now Portland) there were scarcely more than a score of families; while there were less than three hundred in all the other parts of Lincoln County, which at that time practically included all the settlements eastward to the Penobscot, and north nearly to a point opposite the south line of Hallowell.

Many years later Mr. Sullivan was asked the question, "What on earth could have induced you to settle in such an out-of-the-way place?" He replied with characteristic promptness, "I wished to break into the world somewhere, and concluded to make the attempt at the thinnest place." With but two years of legal study with an inexperienced lawyer, and only one year past his minority, one would say it was necessary that legal methods should be thin and "limbs of the law" scant to permit of his gaining a client for whom to win or lose a case.

This bold young adventurer was one of four sons of "Old Master Sullivan," of Berwick, who, according to his own account, was a son of Major Philip O'Sullivan, of Ardea, county of Kerry, Ireland, who was son of Owen O'Sullivan, who married Mary, daughter of Col. Owen McSweeney, of Musgray, and sister of Capt. Edward McSweeney, noted for his anecdotes and witty sayings.

Major O'Sullivan died in consequence of a duel in France, leaving to his wife a large property, and four sons and a daughter. Owing to the troubled condition of Ireland at that period, it appears that one son, John, obtained his education on the continent.

Sometime after his return he formed the acquaintance of a beautiful young lady, and became deeply in love with her. His mother considered the lady's family of too low rank for her to be received into a family which had counts and earls for its ancestors and near relations, and she warned the young man that if he disregarded her wishes in this matter he would derive no further aid from

her; and, finally, she peremptorily forbade the marriage. He replied by requesting her to take a week for consideration before confirming herself in this resolution, telling her that, should she persist in her opposition to his union with the lady of his choice, he would go where she would never see him nor hear from him again. Possibly the lady's family was also so high-spirited, as to refuse their consent to a portionless young man without professional training.

When the specified day arrived John found himself without money and with his proud and cruel mother as fixed as ever in her purpose. He left her, and it proved as he had said, — she never saw him nor heard from him afterwards.

John Sullivan was at this time about thirty-one years of age, and well-qualified to choose a wife for himself. It is related that when over sixty years of age, at the mention of the name of this fiancée, he lost all control of his feelings.

He sailed from Limerick in 1723, landing in York, Maine. Being without the money to pay his passage, he was held under bonds to Mr. Nowell, the master of the vessel, for the debt.

After trying with ill success such work as he could find near the port, he applied to the noted Samuel Moody, minister of York, for assistance in procuring more suitable employment. To prove his qualifications for teaching, he wrote — tradition says — a letter in seven different languages. Mr. Moody generously loaned him sufficient money to satisfy his creditor, and aided him in opening a school at Berwick, in Maine.

During the tedious voyage across the ocean, a pretty child, nine years of age, known to us only by the name of Margery, by her artless prattle and winning ways afforded the wounded heart of the young man much solace. York, it is said, was not the port for which the vessel sailed, a great storm having driven her far out of her course. For some reason, which does not appear, the

passage of this child, also, was unpaid, and her future unprovided for. Mr. Sullivan compassionately became responsible for her, though in debt for himself.

After a few years of teaching Master Sullivan opened a second school at Berwick, and for many years sustained there a school for boys and another for girls. Margery, his ward, lived in his house and shared his instruction.

She grew up a handsome young woman of unusual energy of character. When about twenty-one years of age, she was one day at the well drawing water as a young man passed the house. His appearance, she perceived, was superior to such young men as were common in those parts, while he quickly discerned her unusual beauty and grace. He turned aside from the road, and engaged her in conversation. Fascinated by her charms, he lingered long with her at the well, and ended by proposing marriage. In reply she referred him to her foster father, Master Sullivan, and he sought an interview at once.

Before answering this eager suitor, Mr. Sullivan consulted the young woman herself, learning that no such impression had been made upon her heart as would warrant his consent to the proposal, and the overhasty lover was shown to the door, with the intimation that the further prosecution of his suit would be resented.

This incident appears to have brought Master Sullivan to a realization that Margery was no longer a child; and that, though he had not lost her to this suitor, some other might soon tear her away from him. On further inquiry regarding her sentiments, he learned that he himself had the preference in her affections, though he was at the time forty-three years of age. This was about the year 1735, and they were married soon after Margery's avowal.

One of Master Sullivan's pupils, and subsequently for many years his neighbor, has described Master Sullivan at a much later date than this, as tall, erect, slender, but well-

proportioned and athletic; with dark hair, black eyes and florid complexion. He never partook of intoxicating liquor, but was more fond of poring over his books than of laboring on his farm.

James was the fourth child of this marriage. The parents had intended him for the military profession, but when about sixteen years old he received an injury to his foot and leg while cutting down a tree that incapacitated him for a soldier's life. Consequently he became the student of the family, though but a home-student, as all the children were; and like John, and, after him, Ebenezer, he became a lawyer.

Master Sullivan himself was for many years often called upon to draw wills, deeds and other legal papers; and if any dispute arose in the neighborhood, it was always referred to him for settlement. He died in 1796, at the age of one hundred and five years.

When James was about nineteen years old he entered upon the study of law with his brother John, who, though but twenty-eight years of age, had already attained to a good business. About this time John removed from Newmarket to Durham, N. H., purchasing in 1764, a handsome mansion built by an eminent physician of that town.

The region was one of fertile farms, peace and plenty. The inhabitants had a cherished prejudice against lawyers, who, they believed, fomented litigation for their own advantage. Some of the younger and more energetic residents gave the newcomer notice to quit the town, threatening physical coercion in case the mandate was not speedily obeyed. John informed them that he should not leave, and that, if resort was had to force, they would find him ready.

The people of Durham became greatly excited over the matter, and many were at length found arrayed on each side. Collisions took place between the factions, and one man was severely, though not dangerously, wounded by an overzealous adherent

of Mr. Sullivan. The affair had assumed a very serious aspect, when a truce was called, a conference was held in which it was determined that the question of Mr. Sullivan's staying should be settled by combat between the intruder and a champion to be selected from his enemies.

So this early John Sullivan was in for a fight which he had not sought and did not desire. He was of large stature, and possessed great physical strength, and it was objected by the champion's immediate friends that the match was not a fair one. James, therefore, smaller, and lame in one leg, volunteered as a substitute for his brother, to do battle for the profession. He proved the victor in the contest, and, curiously, the people of the town ever after had the greatest confidence in John.

It was in 1766, the year of the last Indian raid in the town, that James Sullivan became a resident of the most thickly settled portion of the extensive territory of Georgetown, the first corporation in Lincoln County. There is no record of his life here. He no doubt found some legal business, but like his brothers in their early professional life on the Piscataqua, he probably turned his hand to whatever appeared most profitable for the time. It is almost certain that he taught the young ideas of Parker's Island "how to shoot" in other ways than with bows and arrows; and that he acquired skill in gathering the inhabitants of the briny deep within the meshes of the nets, as he did later in entangling the human kind in the meshes of the law, or in relieving them therefrom.

At a subsequent period, having become joint proprietor of a township in southwestern Maine, he, with his associates in the enterprise, set out into the wilderness from Biddeford on foot. This was in 1774, when, on account of the opposition to the measures of the mother country, the courts had lost their authority and litigation was suspended.

Most young married men in the profession would have been gloomy and discouraged in

such circumstances, but young Sullivan possessed a happy and accommodating disposition, and had already become much beloved in his new place of residence.

"Necessity in early life," wrote a contemporary resident of Biddeford, "had brought him acquainted with labor of almost every kind. The ax, the saw, the shovel and the plow he handled equally with any one, and superior to most men, and with such willing resolution that none went before him. He would fell a tree equal to any, and lift as much."

His outfit for his pioneering trip consisted of an ax and a week's provisions. Clad in blanket frock and trousers, he kept pace with his companions, and felled trees and burnt his ground as cheerfully and effectively as the best of them. The week passed, the work necessary to fit his tract for cultivation had been done, and he trudged back, — a distance of thirty miles, — appearing among his neighbors again as cheery and as black as natives returning from a successful hunt.

Sullivan was granted by his partners the privilege of choosing a name for the new town, and he called it Limerick, in honor of his father's birthplace, in Ireland.

The county of Lincoln was incorporated in 1760, and Pownalborough was made its shire town in the same year. It embraced the present towns of Dresden and Wiscasset, together with two others eastward and north-eastward. There was a small settlement at Wiscasset Point, and one scarcely larger on Eastern River, near the Kennebec, in what is now the town of Dresden. The families in the latter place numbered one hundred and fifteen.

The county organization consisted of a Judge of Probate, Register of Deeds and Probate, with a Sheriff and Deputies. A Court of General Sessions of the Peace was held by the Justices of the Peace for the county having criminal jurisdiction, and being provided with grand and petit juries. At the "tory trials" (1777) nine justices sat together.

The proprietors of the Plymouth (Kennebec) Patent built the courthouse, locating it within the parade ground of Fort Shirley, constructed in 1754. The house was forty-five feet long, forty feet wide and three stories high. A room in the second story, twenty by forty-five feet in horizontal dimensions, was fitted up as a court room, and also for several years served as a place for Sunday worship for the settlement. The easternmost block house of the fort was appropriated for a jail, and the easterly part of the barracks as a dwelling for the jail keeper, who was also Deputy Sheriff. This courthouse still stands, a conspicuous building near the eastern bank of the Kennebec, a short distance above the head of Swan Island. It is visible from the river boats and from the railroad on the opposite shore.

"No place in Maine," says Willis,¹ "was so distinguished for its able and talented young men as Pownalborough."

Among those who commenced life in that remote part of civilization were Rev. Jacob Bailey, the "Frontier Missionary;" William, Charles and Roland Cushing, the first two as county officers, the latter as a lawyer; Dr. Thomas Rice; Timothy Langdon, lawyer; Edmund Bridge, the time-honored sheriff; and Jonathan Bowman, Register and Judge.

In this court room James Sullivan is said to have argued his first case. Its walls have echoed also the voices of James Otis, John Adams, the Quincys and Sewalls, and other lawyers of eminence, who here pleaded the causes of their clients.

Generally these Boston lawyers acted in the interests of one or the other side of the Kennebec (Plymouth), Pemaquid and Muscongus Patents; the second best known here as the "Drowne Claim," and the last as the "Waldo Patent." Both the terms of the instruments and the various surveys made under each, contributed to stubborn and long-continued disputes.

The action of the children of Master Sul-

¹ "Law, Courts and Lawyers of Maine."

livan in respect to marriage was quite in contrast with that of their father; for John married at twenty years of age, and James in his twenty-fourth year. While studying with his brother, he made the acquaintance of Miss Hetty Odiorne, daughter of a leading citizen of Durham, and in 1768 they were married.

The young benedick bought a small house of but two rooms in the thriving town of Biddeford, with office in a corner of the garden; and here he commenced housekeeping and business at the same time. As in Georgetown, so in Biddeford, Sullivan was the first resident lawyer. He was shortly advanced to the rank of barrister, and then appointed King's Counsel for the County of York.

In the spring of 1774, James Sullivan was sent as representative of his town to the General Court, which, that year, convened at Salem. He was one of the most active members in promoting the independence of the country, and was prominent in the preparation of addresses to the people, and in the establishment of laws and regulations adapted to the new order of affairs.

At a meeting of chief citizens from several towns held in Falmouth November 4, 1775, the record showed that "Mr. James Sullivan was chosen commander-in-chief over the militia and other companies now in pay of the province." "Colonel Mitchell" was made second in command, and "Colonel Fogg" third. His three brothers were already engaged in the Revolutionary campaigns; but, from his lameness, James was unfitted for a military life, though his talent for it was made evident on several occasions; so he adhered to another line of advancement. In the summer of 1775 he was chosen by the Provincial Congress one of a committee of three to visit Lake Champlain and investigate the military conditions there, also Arnold's conduct of his campaign, and to direct his further proceedings. In this part of their mission the committee came into violent and dangerous conflict with that

pretentious and passionate officer, but succeeded in keeping him within control.

It has often been observed that legislative and other deliberative bodies are very prone to impose upon young lawyers in the membership a full share of the duties. The frequent appearance of Mr. Sullivan's name in very numerous instances and diverse matters shows that he was fully employed, and subsequent events prove that his efforts met with general approval. He was especially serviceable in the preparation of the admiralty laws for the new Commonwealth; and, partly, as a result, he was, in November, 1775, appointed Judge of Admiralty for the Eastern District, embracing the present state of Maine. From this division arose its designation as the district of Maine.

Sullivan resigned this office in the year following to accept his appointment as Judge of the Supreme Judicial Court. He was at this time thirty-two years of age. He continued in the office until 1782, when he was elected a delegate to the Continental Congress. In 1788 he was appointed Judge of Probate for Suffolk County, which office he filled until 1796, when he was appointed Attorney General of the Commonwealth; performing the duties of this office until 1804, when his canvass for the governorship began. He was elected Governor of the State in 1807, and re-elected in 1808; but he died on December 10th, before his term had expired.

The details of his career from the opening of the Revolution would require many a chapter of the length of the present article, which may properly be closed with a tribute from Washington, appropos of some early jealousies and conflicts between the hastily assembled troops from the different states; the General having been heard to say of this period of the war, that when his soldiers were restless, turbulent or discouraged, he had but to send to them one of the eloquent Sullivans, when they quickly forgot their differences and complaints and resolved to persevere in the contest.

JUDICIAL COSTUME IN ENGLAND.

BY J. FERGUSON WALKER.

ABOUT fourteen years ago there was a keen controversy in America as to whether the judges ought to wear robes when performing their judicial functions. The discussion was caused by the New York State Bar Association, resolving that the robe was a suitable emblem of judicial office, and requesting the members of the New York Court of Appeals to adopt it. "Is it true that the judges are going to put on gowns?" said a lady to one of them at the time. "Yes," he said. "When?" asked the lady. "At night," was the reply. The judges, however, complied with the resolution, and thus followed the example of the members of the Supreme Court of the United States, who have always worn robes of office. The change was not so much an innovation as a return to former custom, for the American judges of our fathers' time wore robes as insignia of their lofty functions.

If judicial costume be merely a relic of feudalism, and have no moral or practical value, there is nothing to be said in its favour. It has even been asserted that its only effects are to tickle the vanity of its wearers and to tempt them into an exaggerated conception and exercise of their powers over the people. But men of intellect and character, who have attained the judicial bench after years of laborious effort and business training, are not affected by such trivialities. Robes cannot diminish a judge's ability, learning and integrity, while they have a beneficial influence over the multitude under his jurisdiction by increasing respect for the executive of the law. The uniform of the soldier serves the same purpose, though in this case there is the further object of increased efficiency, a special dress being necessary not only for physical convenience in the operations of war, but in order to distin-

guish the military from civilians, and one regiment or one army from another.

The reason why judicial robes inspire respect does not seem very difficult to determine. It is analogous to the feeling of solemnity produced on entering a great cathedral or on viewing any unwonted spectacle. Sudden change in external surroundings always produces this sentiment, provided there is nothing ludicrous in the transformation. The simplest divergence from the ordinary externals of life is a change of dress. What, then, can be simpler, more graceful and convenient, or more appropriate than the robe? Only in the idle and cynical will it raise a mere ripple of curiosity. The ermine of the bench has been for centuries the emblem of spotless justice and strictest integrity. Though wigs and gowns cannot inspire the people with confidence in a corrupt judge or with reliance on a weak one, they have made many a wise judge look wiser and many a dignified judge appear still more dignified.

In an especial sense it befits the judge elected by popular vote to wear the judicial robe, which then represents the majesty of the people. That a political caucus may have assisted him to his position of eminence, is beside the question. Lord Salisbury once remarked that though he revered the crozier and mitre of an Archbishop, his reverence was changed to amusement, when he saw peering from behind them the familiar features of a certain political wire-puller. But the judge upon the bench no longer plays a political part. His robes do not merely elevate the popular idea of a law court. They elevate the beholder himself by appealing to a certain nobleness in his nature, by gratifying sentiment, and by exemplifying the dignity of the law and of its authors.

The judges of England have from time

immemorial worn robes when performing their judicial duties in open court, though not when sitting in chambers. These vestments are supposed to be of ecclesiastical origin, and they recall a period when clerical and judicial offices had not as yet been differentiated. In Anglo-Saxon times the bishop sat as one of the presidents of the shire mote or county court, and down to the sixteenth century the lord chancellor was frequently an ecclesiastic. The colour of the robes was probably prescribed at one time by the calendar of the church, and still depends on the time of year and the occurrence of saints' days, as well as on the nature of the particular functions which the judge happens to be exercising.

The robes are of three colours—black, purple and scarlet. The black robe is trimmed with ermine; the purple with shot silk, and the red robe with ermine in Michaelmas and Hilary, but with shot silk in Easter and Trinity Terms. At sittings in banco, where the court is composed of two or more judges who hear appeals, informations, applications for mandamus and for writs of certiorari, and other matters within the cognizance of the Queen's bench, the judges wear the black robes trimmed with ermine in Michaelmas and Hilary, but the purple in Easter and Trinity Terms. On saints' days and at criminal trials they array themselves in their scarlet robes, trimmed with ermine or shot silk, and carry with them the black cap which is placed over the wig before passing sentence of death. This cap, which is simply a piece of limp cloth, is also worn by the judges in the presence of the sovereign and when the lord mayor of London goes to the Law Courts on the 9th of November to be sworn in. A broad girdle of silk always confines the robe round the waist. A hood is generally worn over the shoulders and chest, and in addition the serjeant's tippet, which in appearance resembles a broad sash passing from the right shoulder downwards to the left side. When sitting for the trial of ac-

tions with or without a jury, the judge wears his robes without the hood. While cambric bands, much like those of a clergyman, are invariably worn as part of the judicial costume.

The lord chief justice wears over his robes on state occasions the gold collar of S. S., the origin of which is lost in ambiguity. By some the letters S. S. are said to stand for *Seneschalbes* or *Steward*. Others maintain that the collar acquired its name from its resemblance to a series of S's.

Wigs, which are still worn by English judges and barristers, are a much more modern institution than gowns. They appeared in England about the reign of Elizabeth, and though they have been out of fashion since the time of George III., they have never been laid aside by the legal profession. Barristers wear a wig just as it appeared before its extinction as a fashion. "I can hear you, Mr. So-and-So, but I cannot see you," is the usual formula with which a barrister is greeted, if he attempts to address the court minus his wig and gown.

The judges have two sorts of wigs. On ordinary occasions they wear a small tye wig, resembling that of the last century, but on being sworn in, on state occasions, and in charging the grand jury, they are arrayed in the full-bottomed wig, which, though becoming, is heavy and inconvenient to a degree. It was formerly the custom to have the wig powdered, but this fashion has now almost entirely died out. In Lord Eldon's day the powdered bush wig was part of a judge's ordinary attire, even when not sitting in court. Baron Parke's wig earned him the sobriquet of "*Bushey Park*."

Formerly all the judges had the degree of serjeant-at-law and were members of a society or Inn of Court called *Serjeants' Inn*. But the Supreme Court of Judicature, Act of 1875, extinguished this ancient order by abolishing the rule that judges must be selected from those who had attained the degree of serjeant. The judges appointed

before that date still wear on the top of the wig a round little black patch which is the sign of the degree of serjeant and has a curious history. The body of serjeants was known as the Order of the Coif from their wearing a close fitting head-covering of white lawn or silk, called a coif. In shape it was not unlike a Knight Templar's cap. The coif dated from the thirteenth century, and a small skull cap of black silk or of velvet was worn over it. But when the fashion of wearing wigs was adopted by the judges in the beginning of the last century, the coif and skull cap were reduced to a small black patch with a narrow border of white silk, placed on the top of the wig.

In hot weather the wig is sometimes uncomfortable, and the late lord chief justice of England not long ago recognized this by removing his wig one warm day, and giving the members of the bar who were present permission to do likewise. The lord

chief justice of Ireland has often been seen to remove his wig temporarily and lay it on his desk in particularly hot weather.

Accident has sometimes separated learned judges from their wigs. In 1885, Mr. Justice Johnson, an Irish judge, lost his wig when on circuit, and appeared in court at Carlow without it, but he apologized to the grand jury and to the bar for its absence. Lord Ellenborough once permitted his wife to accompany him on circuit, provided that she did not encumber the carriage with band-boxes. On the way his lordship struck his foot against something in the bottom of the carriage, and supposing the obstruction to be one of the hated articles, he promptly flung it out of the window. The learned judge reached the next circuit town in due course and proceeded to robe. "Where is my wig?" said his lordship. "Where is my wig?" "My Lord," replied his valet, "your lordship threw it on the road."



A LEAF FROM HISTORY.**EARLY CONSPIRACIES IN KENTUCKY.**

BY SALLY EWING MARSHALL HARDY.

BITTER indeed was the feeling, in the part of the United States now embraced in the great State of Kentucky, engendered by the delay, on the part of the general government, in admitting the State into the Union of States.

This feeling was increased and intensified by the suspicions that existed that John Jay, who had been commissioned by Congress to treat with Don Gardoqui, the Spanish envoy, favored the ceding of the right to navigate the Mississippi river to Spain, for twenty-five years, by the United States.

It will readily be seen that this treaty must have been ruinous to the people of Kentucky, whose chief intercourse with the outside world was down the Ohio river to the Mississippi, and so on to New Orleans and the Gulf. It is not strange, therefore, that good and great men were found who listened to the pleadings of the Spanish, French and English tempters, and that the spirit of secession was rife in the land. However, no large number of Kentuckians of those days ever thought seriously of severing their connection with their sister States and allying themselves with one of the nations standing ready with open arms to receive them, and nothing beyond the security of the free navigation of the Mississippi was thought of by any but the most extreme.

The controversies that have waged, year after year, over the actions of Kentuckians at this period have been most bitter, and tongue and pen have been used by many in the endeavor to clear accused ancestors of the charge of having been mixed up in the "conspiracies." I am told that some years ago one young man challenged another whom

he heard connect his ancestor's name with the matter.

In "The Kentucky Centenary," Col. R. T. Durrett says :

There were Spanish, French and British intrigues in Kentucky, but the principal ones were Spanish. At the peace of 1783, Spain, with her hereditary proclivity for intriguing and intermeddling, attempted to confine the victorious colonies to the territory lying between the Appalachian mountains and the Atlantic ocean. France supported Spain in this intended outrage, but England was too wise to favor the scheme.

Spain hoped to gain something by intrigue and her emissaries worked upon Kentuckians through their fear of losing the free use of the Mississippi. Her agent, Thomas Power, in 1797, offered openly to furnish money and arms to help Kentucky to separate from the Union and establish an independent government.

Col. Durrett adds :

If Kentucky had seen fit to separate from uncongenial and unprofitable companions and set up for herself, there might have been much folly in her act, and a sufficient quantity of rebellion, which was then fashionable, but not much treason. Self-protection is a stronger tie than allegiance. It is a higher law than treason. To denounce all the eminent Kentuckians who took part in these Spanish proceedings as traitors or conspirators, is to judge the darkness of their days by the light of ours. They had obstacles to contend with which no longer exist, and we can only judge them rightly by judging them in the midst of their surroundings.

They were indeed set in the midst of "sore trials and temptations."

The following was the memorial sent to the President and Congress of the United States :

The Remonstrance of the citizens west of the Allegheny mountains respectfully sheweth — That your Remonstrants are entitled by nature and by right to the undisturbed navigation of the river Mississippi and consider it a right inseparable from their prosperity. . . . We declare it to be a right which must be obtained and do also declare, that if the General Government will not procure it for us, we shall hold ourselves not answerable for any consequences which may result from our procurement of it. The God of nature has given us the right and means of acquiring and enjoying it, and to permit a sacrifice of it to any earthly country, would be a crime against ourselves and our posterity.

On the 27th of December, 1784, was held at Danville, Kentucky, the first of several conventions to consider the propriety and expediency of seeking a separation of the district from Virginia.

The time it took to communicate with the authorities in Virginia may be gathered from the fact that a letter, sent in April, 1781, by Gov. Thomas Jefferson to Gen. George Rogers Clark, containing orders for that officer, did not reach Gen. Clark until the middle of the following July.

Some of the disadvantages that the people labored under were their defencelessness against the savages, their ignorance of laws until long after they had been enacted, and that they had to prosecute suits in Richmond under "every disadvantage of lack of friends, evidence and money."

"The increasing depredations of the savages afforded the advocates of independence a powerful argument," says one historian, "against waiting longer, but to throw off the authority of Virginia without delay and make themselves an independent State."

The memorial of the convention, held in 1786, was sent to John Marshall, afterwards Chief Justice of the United States, then living in Richmond, and by him presented to the Assembly of Virginia. The father of Chief Justice Marshall, Col. Thomas Marshall, lived in Kentucky, having gone there after the Revolutionary war.

The following letter¹ was written by John Bradford, a soldier of the Revolution, editor of the *Kentucky Gazette*, the first newspaper published west of the mountains, and author of "Western Notes," the foundation of Kentucky history, to Judge Harry Innes, who had been Judge of the Virginia District Court, then Attorney General, Judge of the United States District Court for Kentucky, a member of the Board of War for the Western Country, and President of the first Kentucky College of Electors.

October 30th, 1808.

I was not only a member but one who proposed the forming a Democratic Society in Lexington and *I know* that the leading and I believe *ostensible* object in forming that society was to endeavor to mature some plan to induce the general government to use their best endeavors to procure the free navigation of the Mississippi river. I believe I attended every meeting of the society as long as it continued to meet, and there never was any resolution or proposition of any kind whatever made by a member to that society when I was present, or which came to my knowledge, to separate the Western from the Eastern States. The information that Mr. Jay had treated with Gardoqui, the Spanish Minister, for the cession to Spain of the navigation of the Mississippi river for twenty-five or thirty years; and viewing at that time the defenceless state of our country and the neglect and indeed refusal of the general government to protect us against the Indians; or even to suffer us to protect ourselves by carrying war into the enemy's country, disgusted the people of this country generally with the administration and they decidedly declared their disapprobation of the appointment of Mr. Jay as Minister to the Court of St. James.

It was a generally received opinion that the Eastern States were unfriendly to the population of the western country until they had disposed of and settled their own vacant lands. Hence a continual anxiety and jealousy respecting the measure of government.

I believe that it was the general opinion from

¹This letter is now the property of Judge Innes's grandson, Hon. George D. Todd, former Mayor of Louisville, who kindly allowed me to copy it.

about the time of the western insurrection nearly to the close of Mr. Adams' administration that the executive anxiously sought a pretext for sending an army to Kentucky in order to quell that spirit in the people of announcing to the public their opinions on the measures of government which did not meet their approbation; amongst which were the Excise laws, Alien Stamp laws, British treaty, etc. I am confirmed in my belief of the then general opinion, from perfectly recollecting that the people were often exhorted (by the more popular amongst us) to avoid opposing the execution of any law of the general government and in particular the excise law, as there was strong evidence that the government was disposed to make the least opposition to the execution of any law, the pretext of marching an army into our country to crush that republican spirit so predominant amongst us.

The above answers to your queries are correct as far as my memory serves me at the present time.

Yr ob serv.

JOHN BRADFORD.

To Judge Harry Innes,
Frankfort, Ky.

In 1785 Don Diego Gardoqui came to "press the Spanish demands," and the next year, to the horror of Kentuckians, Congress, by the votes of the eastern and middle states, instructed the Secretary of State, Mr. Jay, "not to insist upon the immediate use of the river."

A letter written from Louisville found its way to Tennessee. It said :

In case we are not countenanced and seconded by the United States, our allegiance will be thrown off and some other power applied to. Great Britain stands ready with open arms to receive and support us, so do other powers.

The situation was indeed alarming, and it is not strange that men, prominent and brilliant, should have viewed it with such concern and should have considered every proposition to mend it.

Col. Thomas Marshall, the father of the Chief Justice, who was a man of great ability and strength of character, and naturally

a leader, exerted all of his influence against any violent acts or words. He learned from a letter, written by one of the ultra leaders to another (shown to him by the recipient) that the Spanish Minister, Mr. Gardoqui, was taking advantage of the situation to urge alliance with his country. The letter was as follows :

In private conferences which I have had with Mr. Gardoqui, the Spanish Minister at this place, and have been assured by him, in the most explicit manner, that if Kentucky will declare her independence, and empower some proper person to negotiate with him, that he has authority and will engage to open the navigation of the Mississippi, for the exportation of their produce, on terms of mutual advantage.

Col. Marshall was an intimate friend of George Washington, and in a long letter, dated February 8, 1789, gave Gen. Washington a full account, as he then believed it, of the state of affairs, "the symptoms of foreign intrigue and internal disaffection," he called it.

Col. Marshall was generous, fearless, sincere and outspoken, and the next year wrote Gen. Washington :

My suspicions of some of the men I believe to be implicated, I now think wrong. I think them innocent.

He then proceeded, as an evidence of his trust in them to recommend several of the men he had mentioned in his previous letters, for military commissions of high trust.

Gen. Washington in his reply says :

In acknowledging the receipt of your letter of the 11th of September (1790), I must beg you to accept my thanks for the pleasing communication which it contains of the good disposition of the people of Kentucky towards the government of the United States. I never doubted but that the operations of this government if not perverted by prejudice or evil designs, would inspire the citizens of America with such confidence in it, as effectually to do away those apprehensions which, under our former confederation, our best men entertained of divisions among ourselves, or allurements from other na-

tions. I am therefore happy to find that such a disposition prevails in your part of the country as to remove any idea of the evil, which a few years ago you so much dreaded.

In 1788, Connolly, the notorious nephew of Lord Dunmore, arrived in Kentucky from Canada, "ostensibly to look after his lands at the mouth of the Ohio, but in reality, says Smith, the historian, "to discover the disposition of the leading men in regard to hostile operation against the Spanish on the lower

Mississippi, but he was summarily dealt with. Gen. Wilkinson had it given out that he was a British spy and engaged a borderer to make a sham assault upon him which so terrified him that he quickly left the country."

Thus ended the early conspiracies. On February 4, 1791, after eight years of vexatious struggle which was the cause of all the bitterness and trouble, both houses of Congress passed the act admitting Kentucky to the Union as a free and independent state.

THE COURTS AND POLITICS.

BY BOYD WINCHESTER.

THE power of political partisanship over the judicial mind has manifested itself throughout judicial history—in the highest courts of the most civilized countries. Blackstone wrote: "The law and the opinion of the judge are not always convertible terms, or one and the same thing; since it may sometimes happen that the judge may mistake the law." Not merely "sometimes," but almost uniformly, does this happen when the law stands in the way of strong political bias and prejudice. This political partisanship of judges is not always and necessarily conscious. On the contrary, one of the chief difficulties is that it is accepted unconsciously; that it is so subtle and unrecognized in its approach as to make the mind incapable of fully weighing the force of opposing reason; that it is yielded to not only without corrupt purpose, but often against the personal interests of the judge who succumbs to its force.

As exhibiting both the potency and the quality of this influence may be mentioned Queen Caroline's case, where, in this conspicuous trial, the law-lords, in the house of peers, voted with their respective parties in almost every division; on the one side Lord Erskine, on the other Lord Eldon. So in

the case of Daniel O'Connell, which was one of crucial importance, for it was one of the principal points in Sir Robert Peel's policy that O'Connell should be convicted, and that by the enforcement of his sentence Ireland should be kept quiet. On one side voted Lord Lyndhurst, the Tory Chancellor, and Lord Brougham, then acting with the Tories; on the other side Lords Denman, Cottenham and Campbell, all Whigs.

The prosecutions of Queen Caroline and of O'Connell are not exceptional in English history. The same result has almost uniformly occurred whenever political issues have been committed to judges for determination.

American judges, of all parties, and regardless of tenure of office, when deciding political questions have fallen into the same current which English judges have found irresistible. Able and upright judges we have had in abundance in the United States; and it is not a little remarkable that among our ablest and most upright judges have been found our most uncompromising partisans.

It is not likely that a lawyer can be found with the requisite strength of mind and character to make a good judge, who is not a

man of clear, well-defined and vigorous opinions, and in issues involving high and fundamental political questions, he will not turn his back upon principles woven into the very warp and woof of his life.

Under our form of government it is an important duty and function of the judge to educe and declare the sovereign will of the majority as embodied in our constitutions, state and national. The greatest victories of our parties have been won in the Supreme Court of the United States, as each in turn has been represented there, and has impressed its views upon the decisions of that judicature.

The selection of judges by popular election, which prevails in a large majority of the States, is regarded by many as the most serious menace to the integrity of the courts, and hence to the foundations of our social and political system. But our federal judiciary, with its life-tenure, is far from showing in its history that putting a judge in for life extinguishes in him partisan temper. To a fearless and conscientious judge a life-tenure may only increase the intensity of his political convictions by relieving him from the self-criticism that in retaining his political views he is in some way promoting his political ambition. No! to give a judge a life-tenure does not lessen the effect of political prejudice on his convictions. Unlimited power without responsibility, such as is conferred by life-tenure, with a certainty of no liability to impeachment by a busy Congress, is too great a temptation for many judges to follow the bias of their political training.

The Supreme Court of the United States has been successively possessed by three distinct phases of political opinion. During Chief Justice Marshall's long and honorable service the great majority of the judges were strong Federalists, and honestly believed that not only was the construction given by the Federalists to the constitution right, but that on the maintenance of that construc-

tion the safety of the republic depended. The chief judicial points as to which the Federalists and Democrats in those days differed were, (1) the constitutionality of the Bank of the United States, (2) the constitutionality of internal improvements, and (3) the right of the federal government to control State contracts, by virtue of the clause in the federal constitution prohibiting States from passing laws violating contracts. On each of these questions the Supreme Court of the United States ruled with the Federalists. To say that the Court was right in thus charging the constitution with these high centralizing powers is a *petitio principii*.

The two great parties were divided as to whether the constitution assigned to the federal government these immense powers. The Federalists maintained the affirmative of these issues; the Democrats the negative. The Supreme Court, composed mainly of Federalists, decided these questions in the affirmative—*causa latet, vis est notissima*.

The death of Chief Justice Marshall, and the accession of Chief Justice Taney marked the change of the Supreme Court from its Federalist to its Democratic phase. Soon there were unquestioned signs that the new judges intended at least to go no further in strengthening the hands of the general government, at the expense of the several States. The Dartmouth College ruling was gradually modified; and then came the Dred Scott case, as to which, by a vote divided by sectional, if not political, lines, was announced a conclusion, no doubt with entire honesty on the part of its authors, as well as those dissenting.

As Chief Justice Taney's appointment may be taken as indicating the transition of the Court from Federalist to Democratic political predilections, so the accession of Chief Justice Chase may be taken as indicating the beginning of the Republican era of the Court. On questions relating to the peculiar mission of the Republican party, the judges appointed by Mr. Lincoln, forming, after the secession

of the South, a majority of the Court, were on one side; the distinctively Democratic judges on the other side. As to the legal-tender rulings, it is sufficient to say that those judges who had been attached in earlier days to the Democratic party, or who had accepted the economical and constitutional doctrines of that party, constituted the majority at the first decision, holding legal-tenders to be unconstitutional; while the judges who had belonged to the old Whig and Republican parties formed the minority; and that this minority was afterwards turned into a majority by the appointment, to fill vacancies existing in the Court, of two judges, whose votes, when the question was reviewed, were in accordance with their political antecedents. Then we have the strange heresy of a divided Court, that the constitution of the country exempts one-half of its wealth from contributing to the support of the general government. Like the legal-tender cases the income-tax decision reversed the previous ruling of the same Court upon a great and fundamental political question, which was the centre of a hot partisan controversy. It differs, however, from those cases in that the decisions which it overrules were unanimous and had long been acquiesced in.

It will not do to omit the most momentous semi-judicial tribunal that ever held session in this country, when the Supreme Court Judges, who were members, decided according to party affiliations, and thereby awarded to Hayes the Presidency that belonged to Tilden.

When we pass from questions of construction of the constitution to those of personal liability for political offenses, we find the same exhibition of the political prejudice of our judges, finding expression in their rulings. Justice Samuel Chase, of the Supreme Court of the United States, presiding as circuit judge in the case of John Fries, who was tried the latter part of the last century at Philadelphia for his life, for constructive treason, an-

nounced to the defendant's counsel, before argument began, that he had made up his mind that the law was against the defendant. Upon this extraordinary announcement the defendant's counsel retired from the case, and the verdict of guilty, thus secured against an undefended prisoner, was corrected by a pardon from the President of the United States. It may be added to show the bitter partisanship of Judge Chase, that he left the bench without a quorum to canvass Maryland against Jefferson. Judge Underwood, presiding in Virginia, made confiscation rulings which cannot be surpassed for atrocious disregard of legal sanctions. Judge Durell, presiding in Louisiana, issued an order, without a prior argument, directing the United States marshal of New Orleans to use the federal army to crush out a State government which had not only a legal title, but was in possession. Judge Bond, presiding in South Carolina in 1876, did not hesitate to release on *habeas corpus* State functionaries whom the judges of the State Supreme Court had put in prison for contempt in disobedience of a decree of that court. There are not wanting more recent instances of federal judges resorting to an "encroaching jurisdiction" and "logical cobwebbing" to satisfy partisan demands.

The facts, as conclusively shown by our judicial records, must lead us to conclude, that so far as concerns routine political issues and involving no great stakes, judicial impartiality may be relied on; but that so far as concerns cases of exceptional character — these are fortunately of rare occurrence — and involving great political stakes, a judge's judicial opinions will, consciously or unconsciously, be influenced by his political sympathies. And in such cases the interested parties are prone to canvass the court, not according to weight of legal learning or conviction or characters, but according to political affiliations. This, in some instances, has gone so far to give fresh point to Selden's old gibe: "We know what judges will do."

It being settled, therefore, that judges have always, and probably will always, continue to decide great political issues largely on political considerations, it is folly to attempt to withdraw a case, supremely and critically political, from politics by committing it to a court of justice. To take such issues from a political tribunal to a judicial tribunal, is not to relieve the case from politics, but to saturate with politics the court. It is to infect judges with politics, without disinfecting courts from partisanship. It tends to alienate the people from the judiciary, resulting in a loss of public confidence, wrought by its entanglement in politics.

It is easy to persuade men that a decision against them is against law, or that the judgment has been procured by corrupt means, or by improper influences. The people come to believe that judicial decisions are made a feature of party spoils; that politics has laid its hands upon the judiciary, and is forcing it to decide legal issues on political considerations, as unreservedly as would committees of the legislature, or as the people themselves if summoned to decide the questions at the polls.

That a judge should not be influenced by partisanship so as to favor litigants by reason of political bias, is a proposition from which no right-minded person dissents. "It is plain," says Mr. Bryce, "that judges when sucked into the vortex of politics must lose dignity, impartiality and influence." We are all pleased to place the judge on a lofty pinnacle, where, as Sir Francis Bacon claims, "he should imitate God in whose seat he sits." Still, though it may seem like a low view of human nature, we cannot help conceding that judges are as other men; all are as we were made. Honesty and ability do not exempt from weakness; judicial clay will be found to be like all other human clay.

Judges are human, and the only thing human that is permanent and unchangeable, is human nature.

The Saxon nations are said to be governed by their judges, and ours is preëminently a judge-governed land. In no other country does the judicial power compare with that power in the United States. "Reduced to its last analysis the intelligent and impartial administration of justice is all there is of a free government." The evil done by a supreme judicial tribunal in establishing a false political dogma as a paramount rule of jurisprudence, is irreparable. It is essential to the interests of the community that judicial law, so far as concerns the interests of individuals, should vest rights which future changes of public opinion should not disturb. It is essential to the interests of the community that political law should not be stationary; that it should be endowed with elasticity which will enable it to expand with the expansion of the State; that it should adapt itself to each public exigency that arises; that it should give the proper agencies to each great moral force by which the community may be from time to time impelled.

While our judges have not been able entirely to forget or set aside their political prejudices, they have nevertheless, on the whole, been independent, impartial and fearless, retaining and deserving the traditional respect and affection of the people. It would be extravagant to apply individually to the bench the words of Daniel Webster spoken of the first Chief-Justice of the United States: "When the ermine of the judicial robe descended upon the shoulders of John Jay, it touched nothing that was not as spotless as itself." However, we may truthfully claim that as a rule the American bench is upright, well-intentioned, standing for justice, and faithfully striving to hold the balance even.

MODERN SURVIVALS OF THE ORDEAL.

BY GEORGE H. WESTLEY.

WHAT an interesting chapter one might write upon the old and once widely extended institution of trial by ordeal; how one might describe the ordeal by blood, by fire, by hot iron, by boiling oil, by poison; the ordeal by weighing, diving, chewing, swallowing, touching; the test of the arrow, the bread, the taper, the Bible, the image, the snake, and a hundred other such things—yes, what an interesting chapter one might write hereupon if only previous writers had not been so selfish and inconsiderate as to treat the whole matter so often and so exhaustively that it is now too familiar to be further dealt with.

There happens to be a little corner of the subject, however, which has suffered less than the rest from the attacks of the quill brigade, and upon this I turn my attention. I propose to bring together a few notes showing that this custom of judicial ordeal, mediæval in spirit though it is, has been practised well within the bound of our own generation, and in a few instances very close to our own doors.

Judge Bennett, who was recently retired from active service by the Newfoundland government, relates the following little experience. A few years ago he was visiting one of the small villages of the island, when a woman came to him with the complaint that a pair of blankets which she had hung out to dry had been stolen. She asked the judge to turn the key on the Bible to discover the thief. He of course refused, assuring her he had no such power; but as the woman continued to urge him, he proposed another plan. He told her to get a large iron pot and a crowing bird, and to summon all the men in the neighborhood to gather that evening at her house.

When the company had assembled, the

rooster was put under the pot, the lamp was extinguished in the house and the men were led outside. One man, whom the judge suspected as the guilty party, protested strongly against the proceeding, declaring his disbelief in any such idea as it involved. However, they were required in turn to go in and touch the pot, the understanding being that when the guilty one should do so, the cock would immediately crow.

Each man went in and returned without the expected sign, and the man who had protested against the proceeding now appealed to the fact to show the folly of it. The judge, however, called them into the house, and the lamp being relit, he remarked on the strangeness of the affair and then suddenly asked them all to hold up their hands, when it was found that this man's hands were clean, showing that he had never touched the pot at all. He at first attempted to deny his guilt, but on being threatened with being sent to jail, he gave up his plunder.

While we indulge in a smile at the superstitious credulity or gullibility of these Newfoundlanders, let us not forget that the judicial ordeal is not unknown in our annals. Even the Civil War is less recent than the belief in some parts of our country that a murdered body will bleed or give some sign at the approach of the murderer. In 1868 at Verdierville in Virginia, a suspected assassin was compelled to touch the body of a woman found murdered in a wood; and in 1869 at Lebanon, Illinois, the corpses of two murdered persons were exhumed and two hundred of the neighbors were marched past and made to touch them, in hope of identifying the criminals by the bleeding of the bodies.

In 1833 when a man named Getter was on trial in Pennsylvania for the murder of

his wife, among the evidence which was allowed to go to the jury was that of a female witness who said: "If my throat was to be cut I could tell, before God Almighty, that the deceased smiled when he (the murderer) touched her. I swore this before the justice and also that she bled considerably. He touched her twice. I also swore before the justice that it was observed by other people in the house."

The ordeal of bier-right, as it was called, was employed in New York in 1824, when a suspected murderer named Johnson was led from his cell to the hospital where lay the body of his victim, which he was required to touch. The man's dissimulation, which had before remained unshaken, failed him at this test, his overstrung nerves gave way, and he made confession of his crime. The proceedings were sustained by court, and a subsequent attempt at retraction was overruled.

Crossing the Pacific we find picturesque and peculiar ordeals still more or less employed among the semi-civilized inhabitants of Oceania. The Dyaks of Borneo, for example, sometimes try their cases in this manner: The two litigants are handed lumps of salt of equal size, which they must drop simultaneously into a vessel of water, and the one whose lump is soonest dissolved is adjudged the loser. In some cases each takes a living shell-fish, over which they squeeze lemon juice, and the one whose mollusc first responds to this gentle stimulant by moving, is declared the winner.

In the Philippines these tests are known to have been employed up to a comparatively recent date. A needle was thrust into the scalps of two litigants, and the one from whom the blood flowed most profusely lost the case. Or two chickens were roasted to death and then opened, when the owner of the chicken which was found to have the largest liver was held to be defeated.

Swallowing the goo was an ordeal practised not so very long ago in Japan. The "goo"

was a paper inscribed with certain cabalistic characters; this was swallowed by the accused person, and, it was commonly supposed, gave him no rest, if guilty, until he confessed.

Among the Indians on the coast of Malabar, a person accused of crime is obliged to swim across a large river abounding with crocodiles, and if he escapes, he is esteemed innocent.

The Kalabarese of Africa have a peculiar custom of drawing a white and a black line on the head of a chimpanzee, which is then held up before the accused. If the white line is inclined toward him, he is acquitted; if the black line, he is declared guilty.

The ordeal of boiling oil was practised in India as late as 1867, when a camel driver was compelled to thrust his hand in a vessel of boiling oil to extract therefrom a ring, as a test of his innocence or guilt. The man was severely scalded, and the British authorities, hearing of the case, took prompt measures to suppress further trials of this nature. They compelled the accuser to pay the crippled camel driver a pension of one hundred rupees for the rest of his life.

Speaking of India, an English tourist describes entertainingly how while travelling in that country in 1881, he witnessed a remarkable case of trial, or rather purgation, by ordeal, and at a place not more than a dozen miles from a city where at the same hour English lawyers were pleading before English judges. It was the ordeal of the Tree of Justice.

It appears that one fine day the tourist, observing in the distance a peculiar shaped hill, bare and bald on its crown, set off to mount it. Reaching the top, he came to an inclosure built of sunburnt brick, over which projected the boughs of a large tamarind tree. Entering by the gate, which stood ajar, he found inside an old man seated beside a tomb.

"What place is this?" inquired the tourist.

"This is the hill of Saint Pir Knan, sahib. Here is his tomb and also his tree."

"The tree is sacred to him, then?"

"When the Pir Sahib had finished his bat-

tle with the goddess who at that time occupied the place, he sat down and picked his teeth with a twig of tamarind. It grew and became a tree."

Looking at the tree, the Englishman noticed a certain peculiarity about it. The trunk had divided at about three feet from the ground, and the two limbs had grown together again about four feet higher up, thus leaving an irregularly shaped opening.

"The Pir Sahib planted it there in order that justice might not fail to remain near his tomb," said the old priest.

"Justice," said the visitor, "how do you mean?"

"The sahib must know that the Pir's spirit is in the tree. Anyone who is falsely accused may come here and pass through the opening, and by so doing his innocence is proved; but the Pir seizes the guilty by the loins and holds them there."

A curious tradition, thought the Englishman, as he walked closer to the tree to examine it.

"Possibly in the old days such a thing may have happened," he said to the priest, "but the tree has contracted considerably since then. No one could get through it now."

"Pardon, sahib, one went through only three days ago."

"What! Do people pass through that aperture now?"

"When the Pir permits them, sahib."

"You have seen them pass yourself? Children of course?"

"A full grown woman has passed, sahib. And men have stayed in the tree for three days."

"And how did they manage to eat and drink?"

"How should they eat and drink while the Pir held them by the loins?"

"And how did they get through at last?"

"They confessed and the Pir Sahib pitied them. One, a fat trader, was obstinate. I gave him all assistance, but he stayed."

"How did you assist him, moolajee?"

"I beat him often and hard, sahib, but it was the third day before he confessed. Then the Pir opened his hand and he went."

The tourist examined the hole more closely. It was a long opening, narrower at the middle than above or below. The upper part was the widest. He put in his head till brought up by his shoulders. He felt sure that it was impossible for a grown man to get his chest through such a narrow slit.

"It is not to be done, moolajee!" he said.

The old man smiled.

"If the sahib will wait an hour, he will see with his own eyes."

There was no saying fairer than that and so the tourist waited, determined to see the thing through. In a little while a number of persons were observed coming up the hill, and presently they arrived, three women and three men. While five of the party entered into conversation with the priest, the sixth stood aside, a fine young fellow of about twenty-five with a remarkably good pectoral development, a smooth face and curly hair. Evidently he was the principal actor in *this* affair.

There was very little delay. In a minute or two the women seated themselves beside the tomb, while the man on trial stripped to his waist cloth. His male friends brought water and threw it over his head and shoulders. He was then led up before the priest who was standing beside the tomb with a lighted lamp. Handing this lamp to the young man, the priest made him repeat word by word a form of denial of the offence with which he was charged. It seemed that a lady's character was at stake, and consequently a gentleman's. But singularly enough it was not this young man's own moral conduct that was impugned, but his brother's. It was a case of purgation by proxy. The concluding words of the oath were: "If this be not so, then may the saint seize me by the loins."

It should be explained that the tree stood some three feet from the wall, from which a

brick projected to supply a rest for one foot. The young man now placed his right foot against this, and thrust his head and shoulders into the opening about as far as the visitor had done. How he was to get farther, the latter could not see for the life of him. The next moment, however, the young man gave a quick strong push with his bent leg from the wall, and as he did so a groan was forced from his chest, and his face which came half out grew purple and distorted like that of a man in the clutch of apoplexy. His foot and leg seemed to go on thrusting his body forward independently of his will, and as recklessly as if it were dead matter. The sound of the scrunching of the cartilage of the lungs, as they were jammed and driven by main force into the tree made the Englishman feel actually sick. The struggle lasted about five minutes. After the first groan, which was produced no doubt by the mechanical expulsion of the air from the lungs, the man never uttered a sound. The priest stood by, silent and grave. The poor soul went through his bitter ordeal alone.

Presently it was clear that the worst was over. As soon as the young man's chest and arms were free, the priest showed him how to support one hand on a little knotty excrescence of the trunk below him, while the other grasped a small branch that grew out above. So directed, he had no very great difficulty in getting the rest of his body through, and there he stood apparently very little the worse for his painful experience.

A thing which struck the Englishman as peculiar was the calm indifference of the spectators. They had looked on with no more excitement perceptible in their manner than if they had been watching a sheep trying to get through a thorn fence. There were no congratulations and no expressions of sympathy with the awful sufferings that this incomparable brother must have undergone. The little party gathered up its be-

longings and went away as composedly as if they were just returning from an afternoon call.

When left alone with the priest, the tourist made his acknowledgments, whereupon the old gentleman smiled in a superior manner. "The Pir Sahib is a doer of justice," he said simply, pocketing his fee of one rupee.

Does the reader desire any further explanation of this remarkable scene? I give the conclusion in the tourist's own words. "In thinking the matter over I came to believe that there was a certain amount of power in the hands of the priest. You see it was the upper part of the opening that was passed. There was no jugglery in that; nothing but the most determined resolution, kept up by the most utter faith, could drive a man through those torturing Symplegades. But when the chest was clear and the narrower waist came above the narrower part of the upper and under apertures, I can fancy that the body, if unsupported, would naturally sink and the waist be received in the lower one. Once there, no amount of struggling would clear the shoulders or the hips, and the victim would remain literally 'caught by the loins'—the very penalty he had invoked upon himself. According to this theory, the critical moment was that at which the priest indicated to the man, already practically free, where to place his hands, ostensibly merely so as to spare him the awkwardness of rolling out head first, unsupported, upon the ground below. Had his hands not been so placed the indispensable support would have been wanting, and the saint would have seized the convicted offender exactly at the moment when he fancied himself 'out of the wood.'

"That afternoon," concluded the Englishman, "I was nearer in spirit to the Middle Ages than I ever shall be again."

A CHAT ABOUT BARRISTERS.

BY ONE OF THEM.

THE English Law List discloses the fact that there are over eight thousand gentlemen now living who have been "called to the Bar." Of these, two hundred and twenty-three are Queen's Counsel, the rest being ordinary barristers, known variously as "juniors" or "stuff-gownsmen." The Q. C. wears a silk gown, somewhat plainly made, with a broad and deep collar. Hence the saying that so-and-so "has taken silk." The junior is distinguished by a gown which, though it is made of a less expensive material, is much more elaborately fashioned—reminding one of the old-time smock-frock.

Of late years, the proportion of foreigners appearing in the list has considerably increased, gentlemen bearing the most unpronounceable names (one rejoicing in a string of seven such), and hailing from India, Persia, Egypt, and other parts of Asia and Africa, figuring to about eight per cent. Most of these after being called, return to their native country—for its lasting good, we may reasonably hope.

The number of barristers available for actual work is greatly reduced when we excise those whose practical acquaintance with the Bar ended on their being called. These represent probably one-half of the gross total. Various are the reasons which lead gentlemen to study for the Bar, without any intention of gaining a livelihood by practicing at it: the two most salient being—(1) to thereby fit themselves for Government and other appointments at home or abroad; (2) the desire to advance their social position.

With regard to the first, these gentlemen may be found dispensing justice, according to our ideas, or administering affairs in the name of the Queen, wherever the British flag is unfurled; and a glance at the list of magistrates for almost any county, shows

that many of these names appear also in the bar list. As to the second, the fact of being a barrister is the open sesame to society which would be closed to the man who without it is, say, only a retired tradesman's son.

Not so long ago, an officer came to a police-court to conduct the case on behalf of two of his men who were charged with some civil offence. He was informed that, not being a solicitor, he was debarred from so doing. "But," said he, "I am also a barrister. I was called to the Bar before entering the army, and I appear in that capacity;" and he succeeded in getting the case dismissed.

Those who do intend to practice, choose a circuit at the outset and generally adhere to it. England and Wales comprise seven circuits, and the question of which shall be adopted depends greatly upon circumstances. It is usually considered that a man has a good chance if he or his family is well known to the solicitors in one or more of the towns on his prospective circuit. Marriage with a lady related to an influential solicitor is also a good source of hope; but, as a Lord Chancellor once put it, the man had the best chance who, with brains and an infinite capacity for hard work, had nothing else to rely upon for the necessities of life—which was his own case.

At assizes, to bring in a man from another circuit involves the payment of a heavy additional fee—quite out of proportion to the needs of an ordinary *nisi prius* case. This regulation very much narrows down the area of choice to the provincial solicitors; and occasionally the barrister who is supposed to be the best man of the circuit for the particular case in hand, is retained as soon as it is seen that the action is imminent. On our own circuit, there is one gentleman who figures in almost every criminal case of any importance—and nearly always for the defense.

He has the reputation of making "a rattling good speech," and that is always left to him, whatever other part he may or may not be called upon to take. Many a man has he pulled out of the fire by a good speech at the end, attacking and criticising the points urged by the prosecution, and trusting to the effect of his speech on the mind of the twelve good men and true. If he calls no witnesses, he deprives the prosecution of the opportunity to reply: thus securing the last word—often of the greatest importance in jury cases.

A fact not generally known, is that, as Queen's Counsel are officers of the Crown, it is necessary, before they can appear for a prisoner against the Crown, to obtain a permit, which is, however, always granted, and costs half a guinea.

It is only the bare truth to say that the really leading men can command their own prices, and even then are pelted with work which it is sometimes impossible for them to properly attend to, notwithstanding the assistance of clerks, pupils, and the system known as "devilling." Like other human beings, they cannot attend to two things at one time.

The Parliamentary Bar suffer terribly in this way. The working days in a year are fewest with them, and in their effort to make their hay, the pressure is felt severely by both themselves and the people (mostly public bodies) who seek their services. It is a common practice to retain three counsel to pilot a private Bill through Parliament. You may then hope to secure the corporeal presence of one or other of them throughout, and perhaps two for the greater part of the time. In connection with one Bill in which I was concerned, we briefed three. The leader came and "opened" and we never saw him again during the five days the committee sat, until the favorable decision was given (for which he, with becoming modesty, took the credit); and he was only once at the daily conferences. Frequently we only had

one present, and twice was our counsel's bench empty. Needless to say, they all drew their heavy fees regularly, and with as little diffidence as if they had each and all been in close attendance the whole time.

What can you do? Pay, and look as pleasant as possible. There is nothing else for it.

As in other professions, there are specialists at the Bar. A famous Q. C. (now retired) was related to a well-known musical family, and in consequence, for a generation he appeared in nearly every case involving musical or dramatic copyright.

Not long ago, a county counsel proceeded against a manufacturer for alleged pollution of a stream. The defendant could not afford a fancy fee. Yet, to lose the case meant ruin to him. He *must* have a first-class speaker and cross-examiner, and—more important still—one well up in that branch of chemistry associated with sanitary and public health laws. So far from being able to pick and choose a man who possessed these two qualifications, he had first to be discovered. Eventually he was found—at a handsome fee; but he justified his reputation, and succeeded—which is the main thing. It pays to be a specialist.

Years ago, there was an agitation inaugurated against the practice of charging a fee for the clerk on top of that paid to the principal. This fee is an additional half a crown upon any fee up to five guineas, five shillings up to ten guineas; and so on up to fifty guineas, upon and above which it is two and a half per cent. Many hard-worked counsel have more than one clerk; while, with the briefless crowd, one boy frequently does duty for several, and his almost nominal services (so far as briefs are concerned, that is) are considered adequately rewarded by ten shillings a week.

From what the reader knows now, he will be prepared to hear that the agitation dropped through. Leading counsel don't sit at their chambers waiting for work, and willing to chaffer about fees. Rather, you have to go

cap in hand, and await their pleasure—or run the risk of having your paper returned on any sign of impatience.

It is safe to say that it would be a revelation to those who may wonder at these things, could they but attend a few consultations at the chambers of one of the leading men. To save time, the solicitor will perhaps have prepared a short epitome for present use, in addition to the more or less lengthy “instructions” which were delivered days ago. As likely as not, this will never come out of his pocket, a casual observation from the great man showing that he “knows all about that,” and more—knew it, in fact, before the case began. The all-round knowledge of the world which is stored up in the mind of a leading Q. C. is an eye-opener: it is that which you have to pay so heavily for.

No article on this subject would be complete without a reference to the peculiar—probably unique—relations subsisting between barristers and those whose interests they represent.

You may take papers to “a gentleman of the long robe,” and obtain his opinion—and then you may snap your fingers at him, and refuse to pay. He has no remedy at law. Of course, you would not do it again, either with him or any one of his fraternity—you wouldn’t get the opportunity. Except with a well-known firm of solicitors, or one with whom counsel may have a running account, with half-yearly settlements, the money is left with the papers. Should

the amount tendered be considered inadequate, the clerk intimates the fact to the solicitor. Often enough, the fee is not marked by the solicitors, but left to the barrister’s clerk. One never corresponds with the principal about fees. He, theoretically, is quite above such mundane matters—merely working from platonic motives; his sordid clerk is there to protect him from being plucked, and to collect a commensurate honorarium.

To maintain an equipoise in this otherwise very one-sided arrangement, an effectual, though refreshingly simple, law exists, that a barrister is under no obligation to attend to any work which you may take to him—and pay for in advance. He may return your papers, and pocket the fee; or, worse still, he may go into court, and make the most fatal and idiotic arrangement binding upon your client—and you have no legal remedy, such as a layman has against a solicitor. But here, too, the case is highly hypothetical, and in an experience of twenty years, I have never known real harm to ensue from it. The laws of business and common-sense in effect govern this, as all other professions; and a barrister who sought to take advantage of his theoretical rights, would doubtless have but little possibility of repeating it. The whole thing *seems* absurd; but it works well in practice, and probably neither barristers, solicitors, nor clients, if canvassed, would care to alter it.



THE CRIME AND TRIAL OF BEATRICE CENCI.

By H. GERALD CHAPIN, LL. D.

IT may be doubted whether any of the famous crimes committed in Renaissance Italy possesses greater attraction for historian or romancist than does that of Beatrice Cenci. While we shudder at the atrocities of the Borgias, the recital of none of them suffices to excite the sympathetic interest which is experienced when we listen to the story of the fair parricide. What degree of guilt is to be imputed to her has furnished a most fruitful field for discussion. Pictured by many as the innocent victim of papal greed, by others as an incarnation of the depravity of her epoch, the real character of Beatrice must ever remain somewhat of a mystery. The following pages present what there is reason to believe is a truthful account of the crime and its punishment.

In the Barberini gallery is the beautiful painting by Guido Reni generally supposed to represent the unhappy Beatrice on the eve of her execution. The task of the iconoclast is ever a thankless one and but slight gratitude will be encountered for assuring the admiring tourist that while the picture is very probably by Guido, it is certainly not a portrait of Beatrice. To begin with, no mention is made of it in catalogues of the Barberini paintings printed in 1604 and 1623, five and twenty-four years, respectively, after the execution of the criminals, an omission which the prominence of the present *cause célèbre* would certainly have prevented had the picture then existed. Besides, Guido never painted in Rome until the seventeenth century was well under way, and the execution of the Cenci took place at the close of the sixteenth. In fact, as the features reappear in several church frescoes, the work of that artist, it is highly probable that the beautiful original was but one of his favorite models.

Beatrice's father, Francesco, Count Cenci, was one of the wealthiest men of his epoch, of a lineage antedating the Cæsars. The very name shows the antiquity of the race—a corrupted form of the Centii of Republican Rome. In the history of mediæval Italy, the Cenci are often mentioned as being of a rank almost equal to that of the Colonna, Orsini, Frangipinni and Savelli.

Although the Borgias had ceased to reign for nearly half a century prior to Francesco's birth, their influence had remained and Roman society was sunk in a depravity scarcely exceeded by that which prevailed in the days of Commodus. Living under such conditions, gifted with immense wealth, the result was what might have been expected. That Francesco Cenci was, viewed from our modern standpoint, a monster of iniquity—a doer of crimes unspeakable—may well be believed. That he was any degree worse than many of his well-known contemporaries, is doubtful. Indeed, many charges brought against him have had no foundation other than the brief of that eminent advocate, Prospero Farinaccio, counsel for Beatrice. Nor can too much be expected from an age which had witnessed the death of 72,000 persons practically at the whim of an English Henry, the massacre of St. Bartholomew under a French Charles, and the work of the Inquisition in the reign of a Spanish Philip.

Whatever was his true character, certain it is that Francesco was perpetually at odds with justice. At the early age of eleven he was arrested for having beaten one Quintilio de Vetralli—"usque ad sanguinem," as the record quaintly expresses it. On numerous other occasions he was heavily fined for various offences, the most trifling of which was the beating of two of his servants.

In the archives of the Basilica of San

Lorenzo in Damaso, we find the following record which serves to fix approximately the date of birth: "Feb. 12, 1577, Beatrice, daughter of Signor Francesco Cenci and of Ersilia Santa Croce, his wife." This and the fact, none too well authenticated, that she was educated at the convent of Montecitorio, constitute our entire knowledge of her early life. Her mother had borne twelve children, five of whom died in infancy. The survivors were Giacomo, Cristoforo, Rocco, Antonia, Beatrice, Bernardo and Paolo. Cristoforo and Rocco perished in duels prior to their father's death. Paolo, the youngest, died at the age of fourteen, subsequent to the latter event and prior to the trial. These may therefore be eliminated from consideration. Of Antonia, something remains to be said. It is claimed that, driven to desperation by paternal cruelty, she succeeded in forwarding a petition to Clement VIII. the reigning pontiff, praying that she be placed in a convent. The Pope, however, taking pity upon her defenceless condition, gave her in marriage to a certain Signor Savelli, a nobleman of Gubbio, and compelled Francesco to grant a dowry of some 20,000 crowns. It is but justice to observe that this is extremely doubtful, as no trace of the petition has been found, and the marriage contract, yet in existence, indicates the freest consent to the match on the part of the Count. Her death without children occurred prior to that of her father.

Ersilia Santa Croce died in 1584 and nine years thereafter Count Cenci married Lucrezia Petroni. The family therefore, in the year 1598, if we except Paolo, consisted of five persons, who with a certain Monsignore Guerra or Querra, a distant relative, constitute the chief actors in the tragedy which was to follow.

Monsignore Guerra was an ecclesiastic in the employ of Cardinal Montalto, a man of most dissolute life and a boon companion of Rocco and Giacomo Cenci. With the former he was arrested for a burglary committed at

the Count's residence in March, 1594, when it is charged they made away with a number of valuable articles. At the time of the murder, he is described on the Police Register as being "a man of middle size, red haired, about forty or over." That he had incurred the bitter enmity of Beatrice is shown by the records of the burglary trial which disclose the fact that she testified strongly against him, frequently taking occasion to express a belief in his guilt. Readers of romance will no doubt experience a poignant shock on being informed that Guerra was not the Adonis-like lover of their heroine as he is often pictured, but a rather vulgar individual with not even youth in his favor.

The urban residence of the Cenci family — the Palazzo Cenci — was situated close to the Ghetto. It was of great extent and from the upper part could be seen the immense ruins of Mount Palatine, half hidden under their profuse overgrowth of trees. Shelley, whose language is of course colored by the peculiar views which he took relative to the innocence of Beatrice, says (and his description is in the main, quite accurate):

It is an immense, gloomy and deserted pile of massive architecture, without doors, or windows or any sign of human habitation and tells as forcibly as a building can, the record of crime. It seems stricken with the curse of which Beatrice Cenci was the victim. It contains a noble courtyard, surrounded with granite columns and adorned with antique friezes of fine workmanship built up according to the ancient fashion of Italy, with balcony over balcony of open work. I was greatly struck by one of the gates formed of immense stones and leading into gloomy subterranean chambers, through dark, narrow and lofty passages.

It was here that Beatrice was probably born.

The Cenci led a most turbulent existence and passed their lives in continual bickerings with the head of the family. The plain facts of the case seem to have been that fault existed on both sides. Nor was Beatrice by



BEATRICE CENCI.
(Portrait attributed to Guido Reni.)

any means the angel of purity that her admirers depict. As for the Count, he appears to have been one who was experiencing considerable difficulty in controlling a family rendered licentious and turbulent through force of evil example.

Such was the state of affairs in the year of grace, 1598. Affairs had then arrived at so acute a stage that the entire family, with the exception of Bernardo, who was yet a child, entered into conspiracy to bring about the death of Francesco.

Guerra, as a friend of Giacomo, was called in to assist. It was the Count's custom to pass a few months in each year at Rocca Petrella, a castle in the central part of Italy lying midway between Rieti and Aquila, in the ancient Kingdom of Naples, and belonging to his friend Marzio di Colonna, lord of the fief. This fortress, dismantled in 1642 by order of the Neapolitan Government and now only a mass of ruins, was apparently of the usual type of smaller mediæval strongholds, approached by the main street of the village which it was designed both to protect and dominate. It is thus described in a manuscript record, dated 1642 :

The Castle or Baron's Court (Baronial Corte) stands on a mountain. It has on the ground floor, a dining room and six chambers and covered courtyard or cloister leading to the kitchen. Underground are the prisons. Upstairs are two staterooms and a saloon and two bed-chambers. There is a square in front and a rather large chapel, also a fine piscina.

When the time set for Count Cenci's departure was near at hand, an arrangement was made with two bravi, Olimpio Calveti and Marzio da Fiorani, who were to collect a troop of their comrades and capture the entire family while on the way to Petrella. For the release of Francesco, a heavy ransom was to be demanded, and the others sent back to Rome for the purpose of obtaining it. This, it would subsequently be claimed, they were unable to do, by the time set, and

the banditti not having received the stipulated sum would thereupon put Count Cenci to death. In this way it was believed, no suspicion would attach to the real authors of the crime. Of the two assassins, Olimpio was at one time castellan of Rocco Petrella. He had been discharged from the employ of Prince Colonna at Francesco's request, for the Count appears to have had suspicions not altogether without foundation, as to his relations with Beatrice. Marzio da Fiorani, alias Catalana, had been a servant of the family, but having incurred Francesco's displeasure had lost his situation. Both were urged therefore quite as much by revenge as by hope of securing the large reward offered.

The attempt however, miscarried. Either because Francesco started at an hour earlier than expected, or through negligence on the part of the brigands, the expected seizure was not made and the family arrived safely. Giacomo remained at Rome. A new plan consequently became necessary, and on the 8th of September, 1598, Beatrice admitted the assassins into the castle. This was the anniversary of the Blessed Virgin, and at the request of Lucrezia, whose religious scruples were aroused, the commission of the crime was postponed. The bravi were kept concealed until the following night, their meals being taken to them by Beatrice.

On the evening of the 9th, during dinner, opium was dexterously poured into the wine of Francesco, who shortly afterwards, feeling its effects, retired. About midnight, Beatrice released Olimpio and Marzio and conducted them to his room. The assassins appear to have experienced a spasm of weakness most unusual in members of their profession, for they shortly afterward retired from the Count's bed chamber without having accomplished the deed. Meeting Beatrice in an adjoining room, they informed her that it was impossible to commit the murder. As depicted by Shelley, the scene loses none of its dramatic intensity, for the language which he puts into the mouth of



BEATRICE CENCI IN PRISON.—*Leonardi.*

his heroine was, so the records of the trial inform us, almost identical with that which she actually employed.

BEATRICE — "I ask if all is over."

OLIMPIO — "We dare not kill an old and sleeping man.

His thin gray hair, his stern and reverend brow,

His veined hands crossed on his heaving breast,

And the calm innocent sleep in which he lay,

Quelled me. Indeed, Indeed, I cannot do it."

MARZIO — "But I was bolder for I chid Olimpio And bade him bear his wrongs to his own grave

And leave me the reward. And now my knife

Touched the loose wrinkled throat, when the old man

Stirred in his sleep and said: 'God, hear, oh hear,

A father's curse! What art thou not our father?'

And then he laughed. I knew it was the ghost

Of my dead father speaking through his lips,

And could not kill him."

BEATRICE — "Miserable slaves! Where, if ye dare not kill a sleeping man,

Found ye the boldness to return to me

With such a deed undone? Base palterers!

Cowards and traitors! Why the very conscience

Which ye would sell for gold and for revenge

Is an equivocation. * * *

* * * * Had'st thou a tongue to say 'She murdered her own father,' I must do it,

But never dream ye shall outlive him long!"

OLIMPIO — "Stop for God's sake!"

MARZIO — "I will go back and kill him."

OLIMPIO — "Give me the weapon, we must do thy will."

The murder was accomplished, Jael-like, by one of the assassins driving a nail, held by the other, through the eye and brain of Francesco Cenci. The body was then carried to a small balcony or passageway communicating with the Count's bed-chamber and thrown into an elder tree below, in the branches of which it was caught and held suspended. The fact that there was a closet at the end of the open gallery, would make it appear probable that Francesco had arisen during the night and while walking through the passageway, had slipped and fallen. Among an infinite number of wounds inflicted by the branches, it was thought that the work of the assassins might easily pass unnoticed.

Fortune favored the conspirators. The body was discovered the following morning, taken from its resting place amid great lamentation, and given a most imposing though hurried burial. No one questioned the fact that Francesco had met his death in a manner perfectly explicable. After a short stay at Petrella, the family returned to Rome and no doubt considered themselves secure.

The Neapolitan authorities, on learning of the Count's death, conceived the suspicion that all was not well and dispatched a commissioner to Petrella with orders for the disinterment of the body and the arrest of the murderers if proven that the deceased had come to an unlawful end. Considerable testimony was taken but no facts of any importance were elicited.

It was, however, deemed best that the evidence, such as it was, be forwarded to the Vatican, though the latter took no steps in the matter. Apparently, the proofs were not considered sufficient, for the family remained at large until nearly the end of the year. It was during this interval that Paolo died, so that of the Cenci there remained



A BROTHER OF THE MISERICORDIA.

living only Lucrezia, Giacomo, Beatrice and Bernardo.

The Government of Naples were determined to ferret out the truth of the affair and finally succeeded in effecting the capture of Marzio who, having been put to the torture, made full confession. The Pontifical authorities were immediately notified and pending Marzio's arrival at Rome, the conspirators were arrested.

Olimpio, the other bravo, it may be observed in passing, was killed at Cantelice, a village near Petrella, in the May of 1599, by two brothers, Marco Tullio and Cesare Busone.

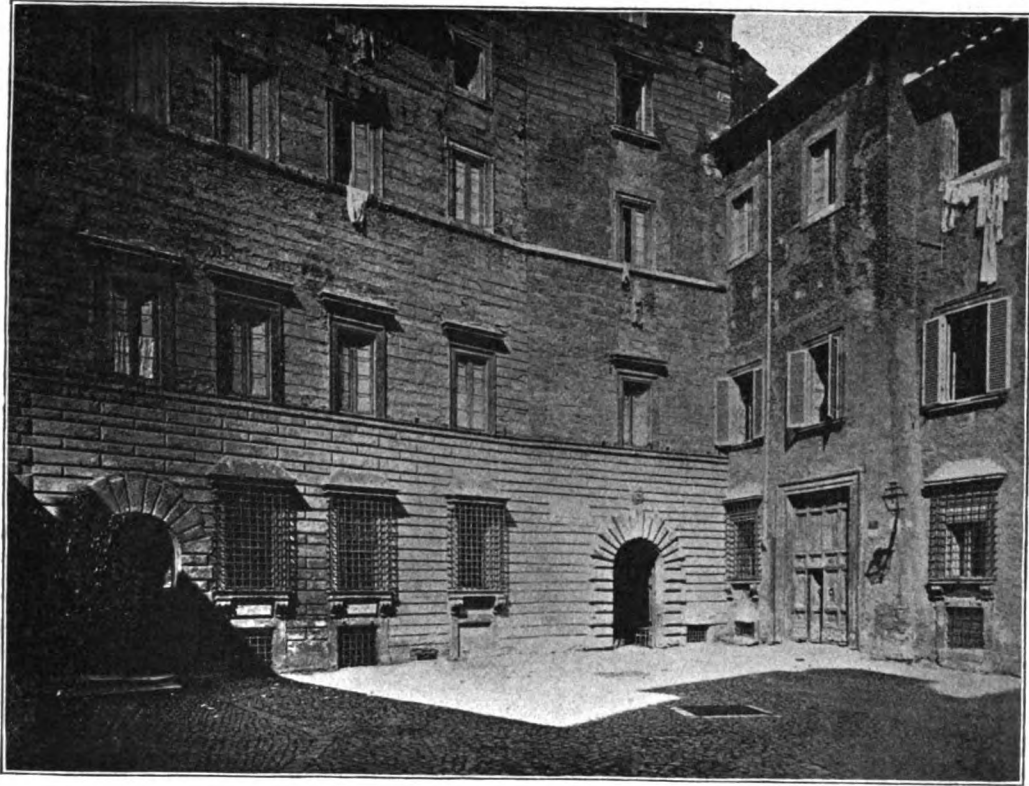
The Roman police apparently had strong doubts as to their ability to make out a case against the accused, for we find that the Cenci were treated with a considerable degree of leniency. At first, Lucrezia and Beatrice were merely kept at home under guard. This lasted only a short time and soon they were sent to rejoin Giacomo and Bernardo. These were held in custody, at the prison of Corte Savella and later at the Castle of St. Angelo, from which a subsequent transfer was had to the first place of detention.

Guerra from a friend at court, received early notice of his intended arrest and succeeded in making his escape. His subsequent career is involved in mystery. One account is that he finally drifted into a Swiss regiment in the service of Henry IV. of France.

When Marzio arrived, the Roman authorities caused him to be re-examined. The assassin thereupon retracted his previous confession and expired under new tortures without having added anything to the proofs already accumulated. His conduct has furnished the basis for a touching story of the hopeless love which he is said to have cherished for Beatrice. While possibly this is true, we should not adopt a theory merely because it may chance to finely blend with a romantic tale of a romantic epoch. In any

event, Marzio would not have been the first nor was he the last bravo faithful to his employers even to the end.

The trial of the Cenci was now to begin. English and American legal writers are in the habit of concisely stating the difference between Continental systems of criminal procedure and those in vogue in their respective countries, by saying that the former is inquisitorial, the latter accusatorial. The one assumes a criminal to be guilty until his innocence is established, the latter proceeds upon the theory of innocence until guilt be proven. Of the former, torture is of course, a logical concomitant, though it is only fair to say that no application of it might be made until some indication of culpability existed. Hence, a trial in that day resembled not so much an attempt to discover the truth, as a test of endurance on the part of the prisoner. And yet the procedure adopted in the infliction of pain either for the purpose of extorting a confession or otherwise, was most minutely prescribed by a law which laid down the judges' duties with much particularity. Torture was divided into the "ordinary" and the "extraordinary." The latter was only made use of in cases where a grave crime had been committed and reasonable grounds existed for believing the accused guilty. There were in Rome at that epoch numerous methods of torture of which the best known and most frequently employed were that of the "watch" and the "rope." The principle of the former is very ancient and consists simply in not permitting the sufferer to sleep. The prisoner was seated on a small chair with diamond-shaped seat and back. His legs were bound to keep them from touching the ground and his arms fastened from behind to a rope running to the ceiling. The executioner's assistants prevented the accused from sleeping, and at intervals rocked him backward and forward on the narrow seat, or raised him to a short height after which he was dropped upon it. The nerve-racking quality of this diabolical



PALAZZO CENCI.

method of torture is apparent. Jurists of the middle ages appear to have had implicit faith in its power to extort a confession. Farinaccio, the advocate of Beatrice, author of a work of some two hundred and fifty closely printed folio pages with double columns, treating of torture generally, says that out of a hundred accused only five were able to withstand its torments.

The "rope" was divided into three degrees, the slight, the medium and the severe. The first acted purely upon the imagination and consisted in conducting the accused into the torture chamber where he was disrobed and his wrists bound together from behind by a rope running through a ring attached to the ceiling. His sufferings should he persistently refuse to confess were then minutely described to him. If this failed, he was raised from the ground by means of the rope, the other end of which was attached to a windlass. The suspension lasted but a short time, and the raising and lowering were done with some degree of gentleness. Thus ended the torture "ordinary."

The torture "extraordinary" consisted in prolonging the suspension, swinging the sufferer backward and forward like a pendulum, or raising him to the height of eight or ten feet and allowing him to fall, stopping him with a sudden jerk when within a few inches of the ground. Often weights were attached to the feet to increase the shock.

With the exception of Beatrice, the murderers gave way on being subjected to the "ordinary" and made full confession. Upon her, neither persuasion nor torture had any effect. She persisted in declaring her innocence. A different result, however, followed the application of the method "extraordinary." The following is freely translated from the *procès-verbal* drawn up at the time:

And as during the entire interrogatory, she had confessed nothing, we placed her in charge of two officers who conducted her to the torture

chamber where the executioner awaited her, and there after having shaved her head, the executioner made her seat herself on a little seat . . . tied her hands behind her back, attached them to a rope passed through a pulley fastened to the ceiling of the room, the other end of which rope was attached to a wheel with four spokes, turned by two men.

And before she was raised, we interrogated her again as to the said parricide, but despite the confessions of her brother and of her step-mother which were again shown her, signed by them, she constantly denied her guilt, saying, "Have me drawn up and do what you choose. I have told you the truth and shall tell you nothing else though you dismember me."

Wherefore we had her drawn up, having as we have stated, her hands tied to the said rope, to the height of about two feet and having left her thus while we recited a Pater Noster, we asked her again as to the facts and circumstances of the aforesaid parricide, but she would say nothing but what she had already stated, nor otherwise reply than by saying, "You are killing me. You are killing me."

We raised her yet higher and even to the height of four feet and commenced an Ave Maria, but before we had half finished, she pretended to faint.

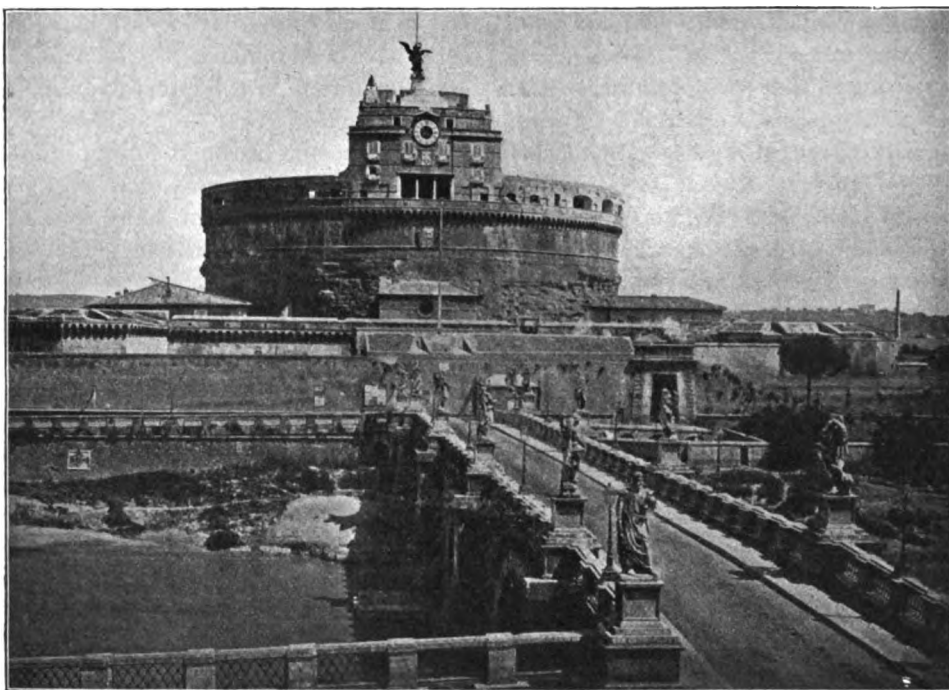
Seeing that she persisted in her denials, we ordered the executioner to give the shock.

In consequence, the executioner raised her to the height of ten feet and we then called upon her to tell us the truth, but either because she had lost the power of speech or because she would not speak, she answered only by a gesture of the head signifying that she either could not or would not say anything.

Seeing which, we gave the executioner a signal to let go the cord and she fell with all her weight from the height of ten feet to the height of two feet, and with the shock her arms turned wrong side outwards and she gave a great cry and fainted.

We made them throw water over her face. She recovered and cried, "Infamous assassins, you are killing me, but were you to tear out my arms, I would tell you nothing!"

We consequently ordered that there be attached to her feet a weight of fifty pounds. But



CASCADE AND BRIDGE OF ST. ANGELO.

at this moment, the door opened and a number of voices cried, "Enough, enough, do not let her suffer longer."

The voices were those of other members of the Cenci family, for the judges despairing of obtaining a confession by means of the torture, had directed a confrontation of all the accused.

Even to their prayers, Beatrice for some time refused to listen, pleading with them to remember the honor of the family and keep silent. Finally realizing the futility of further concealment, "Untie me," she said "and read me the interrogatories. That which I ought to confess that will I confess, that to which I ought to assent, to that will I assent, and that which I ought to deny, that will I deny."

Clement VIII. was the reigning Pontiff, a Florentine of the great Aldobrandini family. Partisan writers have fostered the belief that the chief crime of the Cenci was their immense wealth, afterwards, it is alleged, confiscated by the papal see. This however is scarcely accurate, for the accused appear to have received all due and proper consideration at the hands of the authorities. Though torture was resorted to, we must remember that it is but a short time, comparatively speaking, since this ceased to be a recognized part of continental procedure, and its final discontinuance was regarded by many as a most dangerous innovation. Only within the past year has English law permitted an accused person to testify on his own behalf. Whatever be the demerits of the system under which she was found guilty, Beatrice was tried with all the fairness and impartiality which the jurisprudence of mediæval Italy allowed to a prisoner. Time was given the accused to prepare their defence, which was undertaken by some of the most eminent advocates of the time. Chief of these was the Prospero Farinaccio previously alluded to, who was afterwards Procurator General under Paulus V. It is possibly due to the many specious inventions coined by that learned practitioner in

endeavoring to save the lives of his clients, that much of the present uncertainty exists. He appears to have hesitated at nothing and even went so far as to claim that Bernardo was of unsound mind. To Francesco, he imputed the most monstrous crimes.

Extant is his plea beginning: "Holy Father, although Beatrice Cenci has impiously procured the death of her father," etc.

It is barely possible, not that a pardon would have been issued, for the offense was too heinous, but that lesser punishment might have been inflicted, had not a new crime been committed in the interval, in many respects similar to that of the Cenci. The Pope on learning of the revolting murder of the Marquise of Santa Croce by her son Paolo and the subsequent flight of the criminal, is said to have feared the effect of any display of leniency. On the 9th of September he summoned before him Monsignore Taverna, Governor of Rome, and placed the matter in his hands. Bernardo was alone excepted from the execution of the decree.

At five o'clock on the following morning, the prisoners were aroused from sleep by the entrance of the officers attended by brethren of the Misericordia — that masked fraternity whose duty it is to accompany the prisoner to the scaffold. Strange as it may seem, Beatrice alone failed to receive the news calmly. Soon she recovered herself and listened to the sentence unmoved. Mother and daughter were to be beheaded. Giacomo, besides having his flesh torn with red hot pinchers while on the way to the scaffold, was to suffer the punishment of the mazzolato — to be killed by a blow from a mace — and his body quartered.

All called for notaries and executed their wills in due form. That of Beatrice provided that her body be buried in the Church of San Pietro in Montorio to which she leaves a hundred crowns. A special bequest to the same church of three thousand crowns is added for the purpose of building a wall

to support the road leading thereto and for the celebration forever of a daily mass for the repose of her soul. The application of this money was to be under the control of her confessor, Fra Andrea, a friar of the convent. By other bequests, she leaves over seventeen hundred crowns to thirty-one different churches for the saying of some thirty-two hundred masses.

The fact that the Cenci and particularly Giacomo, to whom the entailed estates had descended, were allowed full power of disposal over their property, militates strongly against the statement that their wealth eventually passed into the possession of the Aldobrandini family.

Extant also is a record of the last prayer of Beatrice :

O Christ, my Master, thou callest me and I flee to thee with all my heart. Do not refuse me thy forgiveness for the great sin that I have committed. Since thou, innocent, didst suffer so many torments and even an ignominious death, why should I, a sinner, hesitate to throw myself into the arms of death and a too easy death when my sins are remembered ? I am about to depart with a firm hope of going to

dwelt near thee in thy paradise, or at least in a place of purification and deliverance.

But little more remains to be said anent the fate of the ill-starred race. Of Bernardo, sole survivor, we have no record save that he died some twenty-eight years later, leaving two sons and a daughter.

The last scene of the tragedy was to be enacted at the square of the castle of St. Angelo, where the wretched conspirators suffered the punishment due to their crime. A curious incident is found in the fact that while the head of Beatrice rested on a block and before the blow was struck, a cannon from St. Angelo gave the signal to Clement, then at Monte Cavallo, and absolution was bestowed "*in articulo mortis*" e'er the blow had descended. Her wishes were carried out and she rests in San Pietro. If she has sinned, so has she suffered. If great was the crime — bitter was its punishment. *Que la terre lui soit légère.* For us, her career was finished with the announcement of worthy Master Allessandro — the Sanson of his day — "This is the head of Beatrice Cenci — a Roman maiden."



THE PROPRIETARY GOVERNMENT OF CAROLINA.

BY A. M. BARNES.

AS is well known, no permanent English settlements were effected within the territory now covered by the United States of America until the reign of James I., for by this time every trace of Raleigh's colonies had disappeared.

In 1606 a land charter was given by James to Sir Thomas Gates and "certain knights, gentlemen, merchants, and other adventurers." This grant to specified lands in the new world was bestowed with the understanding that they were to divide into two colonies. It stipulated that those from the city of London were to establish themselves at some favorable point on the coast of Virginia, while those from the cities of Exeter, Bristol and Plymouth were to plant their colonies within the New England domain. It was under this charter that Virginia was colonized in 1607, and New England in 1620.

The first English colonies in America were founded under charter governments. They were each a kind of municipality, or civil corporation with the power of not only directing its political affairs, but also with that of making its own laws for interior regulation, subject, of course, to the stipulations of the charter.

The next form of government was the Proprietary, and it was with the introduction of this that the political cauldron, already a-simmer, began truly to boil. That it bubbled over finally, burning many, and giving all more or less a blistering was no wonder.

The first proprietary grant of land in the new world was to the Earl of Marlboro by James I., whereby he was given "full claim and title" to the Island of Barbadoes. This grant was afterwards set aside by Charles I., who bestowed this island, along with all the Caribbees, to his favorite, the Earl of Carlisle. This latter charter, which afterward

became so noted because of the precedent it set for the other proprietary charters, was dated June 2, 1629. In the following year the same monarch, through a second grant, conveyed to his Attorney General, Sir Robert Heath, the Province of Carolina, or as it was then spelled, "Carolana." To be more explicit this charter gave to Sir Robert sole possession of "all that region lying south of Virginia, extending from 31° to 36° of north latitude, and westward within these parallels across the continent from ocean to ocean." Two years later the grant was enlarged by a second, which extended the territory to 29 north latitude. The London Council on August 12, 1663, revoked this charter, declaring it null and void, because of failure to comply with its conditions, foremost of which was that requiring the peopling of the territory. Instead, there had been only feeble and unsuccessful attempts at colonization, so that for more than thirty years the vast territory had remained practically unsettled.

The proprietary charter under which the Carolinas were really settled, becoming a province of His Majesty, was that given by Charles II., shortly after the Restoration, to certain of his faithful supporters. The men thus specified and rewarded were Edward, Earl of Clarendon; George, Duke of Albemarle; William, Lord Craven; John, Lord Berkley; Anthony, Lord Ashley; Sir George Carteret, Sir William Berkley and Sir John Colleton. Aside from the distinguished services rendered the crown, another ground upon which they petitioned their sovereign for the rights to a "certain country in the parts of America," was that they were "incited by a laudable and pious zeal for the propagation of the gospel . . . among barbarous people having no knowledge of God." That none of these gentlemen were really actuated by

any pious desire for the spiritual welfare of the heathen after events too forcefully proclaimed. That they were spurred to the request for lands by the prick of their own rapacious desires and selfish interests was also only too clearly made manifest. The souls of the heathen were empty of the gospel, but the pockets of the Proprietors were not empty of gains.

On the granting of the charter to Sir Robert Heath the Province of Carolina had been constituted a County Palatine, modeled after the three that had existed in England, those of Durham, Chester and Lancaster. But at this time there was only one remaining, that of Durham, within which the Bishop of Durham, as Palatine, exercised certain imperial power, such as the King himself had in his own palace. In plainer words he was "lord of all." He could pardon treasons, murders and felonies, appoint Judges and Justices of the Peace, and all the writs and indictments issued and served throughout the Palatine County had to be in his name, as they were in the King's for the other counties. In the letters patent given to Sir Robert Heath, Charles I. had explicitly declared that he had bestowed upon this favorite,

All Rights Jurisdictions privileges prerogatives Royalties libertyes immunities with Royal rights & franchises whatsoever so well by sea as by land within that Region Territory Isles & limitts aforesaid.

Furthermore he was empowered

To forme, make, & enact, & publish . . . what laws souer may concerne the publicke state of the said province or the private proffitt of all according to the wholesale directions of & with the counsell assent & approbation of the Freeholders of the same Province or the Major part of them.

The same imperial powers were granted by Charles II. to his Lords Proprietors. The eldest was to be the Palatine; and on his death the eldest of the survivors was always to succeed him. The first Palatine of Caro-

lina was the Duke of Albemarle. The honor should have belonged to the Earl of Clarendon, but, when on October 21, 1669, the Proprietors met in London to organize the Palatine Court, the Earl of Clarendon was in exile. He had fallen from the favor of his capricious Royal Master.

Like Sir Robert Heath, these Proprietors were given authority to make any law "according to their best discretion of and with the advice and assent and approbation of the Freemen of said Province, or of the greater part of them or of their delegates or deputies." In order to enact laws for the good of all concerned, the Lords Proprietors were to assemble delegates or deputies of the common people from time to time "in such manner and form as to them should seem best." This was truly a most important clause of the charter and in time proved to be the political as well as the social salvation of the people of the Province of Carolina. For it gave them the one bit of sure foundation on which to plant themselves in the struggles against the tyrannical provisions of the Proprietary Code, better known as the Fundamental Constitutions, the Grand Model of Locke and Shaftesbury, to which respects have already been paid in these columns. Their assent, at least, was necessary ere the laws could become constitutionally of force.

The Proprietors also had the power of conferring "certain marks of favor," or titles of honor, upon whomsoever their choice should fall; a privilege unwisely and rashly bestowed, since it led to a state of affairs, of dissatisfaction and dissensions, that in the end came near plunging the whole Province into civil war.

In order that the government might be all the more acceptable to the sovereign, but chiefly to avoid the setting up of a "too numerous democracy" — in other words to curtail the rights and privileges of the common people — the Province was divided into counties. Each county had eight seigniories, eight baronies, and four precincts, the pre-

cincts being each subdivided into six colonies. All these allotments or divisions were made with reference to the support of the aristocracy. The eight seigniories, 96,000 acres, were the shares of the eight Proprietors, while the eight baronies went to the nobility, those upon whom the special marks of honor were to be bestowed. Until 1701 the Proprietors were allowed to dispose of their shares, or seigniories, together with the prerogatives that each exercised therein, but after that time alienation was allowed for the term of twenty-one years only, and then but to the extent of two thirds of the estate. One third was to remain in the actual possession of the Proprietor. It could not even be leased to tenants. The proprietorship, with its landed estate and its authorities, fell to the next male heir, and, for want of one, to a Landgrave or Cacique of Carolina descended from the female heir next in line. If there were no female heir, then they went to the next heir general. Each county was so mapped out that it contained 480,000 acres, or 750 square miles. Each seignior, barony, or colony contained 12,000 acres. The share of each Landgrave was four baronies, or 48,000 acres; of each Cacique two baronies, or 24,000 acres. There were as many Landgraves as counties, and twice as many Caciques. The remainder of the lands were for the people. There was another subdivision allowed, that of the manor. This tract consisted of not less than 3,000 and not more than 12,000 acres. To legally establish the barony the order of the Palatine Court was necessary. When once established the Lord of the Manor, within his own boundaries, had all the rights and privileges of the Landgraves and Caciques. He was absolute in will and authority, as the following clause of the Proprietary Code plainly indicated: "In every seignior, barony, and manor all the leet-men shall be under the jurisdiction of the respective lords of the said seignior, barony, or manor without appeal from him." This provision was an adaptation of the old law of

England with reference to leet-men and leet-courts. These courts were to be held once a year within each landed precinct, and to them each freeholder within the territory between the ages of 16 and 60, was to be summoned with the exception of peers, clergymen and women. But to the leet-laws of the Province of Carolina was added the oppressive one not observed in England, that no leet-man or leet-woman "should be at liberty to go off from the land of his or her lord without leave obtained from the said lord under hand and seal." No one could hold a leet-court except a Proprietor, Landgrave, Cacique, or Lord of the Manor. The act of becoming a leet-man was voluntary. Whosoever desired to be such must enter himself in the registry of the County Court. For this complete abnegation of self to the interests of his Lord he was to receive, on marriage, the magnificent allotment of ten acres of land for life, for which he was to return to his Lord, or heirs, "one-eighth part of all yearly produce and growth of the ten acres." A wonderfully generous concession indeed on the part of the aristocrat, who, in everything that he did, seemingly to the betterment of the worldly prospects of these slaves of the manor, was really only looking forward to his own interests.

These leet-courts were soon absorbed in the county and precinct courts.

It is no wonder that against this statutory array of idiocy and tyranny the people should have from the first made murmur, this discontent growing into a spirit of resistance that soon became a voice as of the surf tempestuously beating upon the shore. How visionary, impracticable and void of even common sense in many of its rulings was this form of government foisted upon the people of the Province—the most of them men of hardy nature and independent spirit—is evidenced in that clause of the code which provided for a Court of Heraldry. The jurisdiction of this court was the regulation of fashions, games and sports. An-

other clause equally as idiotic, to say nothing of its arrogance, was that which declared that there should be no discussions or arguments with reference to the provisions of the law, no expositions either written or otherwise upon any passage or passages of the same, as such liberty with the text thereof would have a tendency to obscure or perplex the meaning.

In direct disregard of that clause in the charter which so plainly specified the rights of the freemen of the colony this system of unjust and iniquitous law was foisted upon them, and the Proprietary Government declared established. That it had not become constitutionally of force made no difference to these men who sought only to serve their own selfish interests irrespective of whose privileges they curtailed or whose rights were disregarded. The Province of Carolina should be theirs in the fullest sense. A very strange proceeding this was on the part of men anxious to induce colonization, and even then scattering abroad the most invitingly worded invitations, offering gilded inducements to the settlement of the Province.

Honors fell easy. Locke himself was made the first Landgrave, while the Proprietors abused their powers to the extent that, instead of abiding by the clause which restricted the bestowal of favors and honors upon such of the inhabitants of the said Province as they (the Proprietors) should think "worthy to receive them," they were given to persons outside the Province, very often as a kind of return coin for value received. We may well believe that these men, the first Lords Proprietors of Carolina, served their own selfish ends whenever they could. Thus, while they enjoyed the honors and profits arising from the titles and allotments of land, some of the Landgraves were never in Carolina, as for instance, James Carteret, Thomas Amy, John Price, and others.

The Constitution provided that the eldest of the Lords Proprietors should be personally in Carolina. He thus became the Pala-

tine's Deputy. But if such Lord Proprietor should be unable to give personal supervision over affairs of the Province and no other Proprietor or heir of a Proprietor should be resident in the Province, then the Palatine should choose one of the Landgraves from the Grand Council of the colony. It was probably with the view to strengthening this provision that nearly all the Governors under the Proprietors were made Landgraves. The Hon. Edward McCrady, in his *History of the Proprietary Government of Carolina*, very significantly remarks: "Besides the Governors, but three or four Carolinians, *i. e.*, inhabitants of the Province, were deemed worthy of being appointed Landgraves."

There was one grain of common sense in all this mass of folly on the part of the Lords Proprietors. This was that they realized that this grandly worded and elaborately outlined scheme of government could not be launched at full headway upon a colony composed in a large degree of men of independent and adventurous spirit. They saw therefore the wisdom of preparing a set of temporary laws, which were entrusted to the Governor. These were to be in force until gradually those outlined in the Fundamental Constitutions took their place. This wisdom took its flight the moment that event began to shape itself.

As may be supposed, no system that embodied within it man's slavery, especially the slavery of those who had once tasted freedom, could long hold together. The dream of a landed aristocracy in connection with an extensive villanage was too elaborate and too devoid of the elements of adaptability for a new country permeated with the spirit of self-assertion. The old feudal system was fast dying out, even in Europe, where it had taken to itself a growth hardy enough to last for years. But now its very tap-root had fallen into decay. It was worm-eaten through branch and stock. None but a visionary mind could have seen any hope for the flourishing of the sickly plant in the vigorous soil

of the new world. It was no wonder its life was sapped out within a short span.

The King, too, James II., grew dissatisfied. The course of Government in Carolina and elsewhere had not run to suit him. For one thing, he was not satisfied with his share of the revenues; for another, the Proprietors had usurped quite too much authority to his way of thinking. He determined to show who was master. The King played his hand, the result being the downfall of the Charter Government of New England, but, for some reason, the Lords Proprietors of Carolina, while they, too, were shaken up, were not then overtaken in the ruin that

overwhelmed the others. Their bitterest chastisement, and, in time, their overthrow, came through those whose rights and privileges had been so shamefully ignored,—the long abused common people. Thus their downfall was brought about, not by act of royal authority, but as the result of revolution. It was no mad riot, nor series of riots; no outburst of the spirit of anarchy, but the calm and persistent demonstration of a resolute people against a power that had had for them neither justice nor consideration. The struggle extended over a period of several years, the final victory coming in 1719.

IN AN IRISH LAND COURT.

THE little courthouse is grimy with the trampling of muddy feet, and the hot breath of the heating pipes draws out the steam from clothes soaked by the soft Irish rain. A couple of lounging policemen in the trim half-military uniform of the constabulary represent the majesty of order. The hard, dirty benches are crowded by small farmers from "remote townlands" with unpronounceable names — Magherahamlet and Carluacreavy, and Slivenascullion, "such as had made Quintilian stare and gasp" — rough-coated, rugged-faced men, with a look of intent expectancy. For to-day some of the first batch of "second term applications" came on for hearing, and rents which were reduced fifteen years ago, will be reduced again now, or the tenants will know the reason why. The well of the court is filled with country solicitors, some shades less rough in appearance and speech than their clients, but often such as Chancery Lane and Bedford Row would be slow to acknowledge as colleagues. Yet for the hard-pounding, rough-and-tumble style of the work, which is to be done here, they are as far ahead of their glossy metro-

politan brethren as they would be behind the latter on a chancery appearance before a finicking chief clerk.

Mingled among the solicitors are two or three junior barristers. They wear no robes down here, and there is nothing to distinguish them from the "other branch" save that the cut of their regulation black morning coat tells of Grafton Street or West End tailors, for the Irish bar, spite of the evil days which have fallen upon it, still strives to keep up its ancient dignity in matters of dress. Both barristers and solicitors are divided sharply into landlords' men and tenants' men. The Irish farmer — quite as much in Ulster as in the south — looks upon all land court proceedings as a strict war of classes, in which he who is not with him is against him. A man who has once become known as a tenants' attorney or a tenants' advocate would jeopardize his practice almost hopelessly by appearing on the other side in the battle between those who till the soil and those who (theoretically) own it. Quite lately a caucus met in an Ulster agricultural constituency to consider candidates, and the name of a prom-

inent barrister came before it. "Is it true," asked a farmer from the back of the hall, "that Mr. Wigmore appears against the tenants?" And upon the proposer sorrowfully confessing that it was true, it was seen at once that, for that constituency, Mr. Wigmore was doomed. Accordingly, the landlords usually appear through the old-established solicitors who manage their estates, while the smaller fry are left to exploit the tenants.

But the subcommissioners are coming on the bench. Their appearance does not diminish the half-grotesque effect which the whole court suggests to an eye trained to the more dignified conventionalities of English tribunals. Wiggled and gowned, the legal assistant commissioner sits in the middle chair, flanked by his two lay commissioners, popularly called his wings. This legal commissioner has a big county to work, and has five pairs of wings. Years of hurried transport through outlying districts have worn away from his wig almost the last trace of its pristine whiteness, and it now frames his face as in dull gray wool. He is evidently anxious not to look legal, for he wears a moustache thicker than the Kaiser's, if not quite so long; and to this in moments of meditation he administers a mighty twist till its points stand up to his eyes like the bravest Herr lieutenant's of them all.

Yet, this illegal looking judge is reputed to know more about the Irish land law and the agrarian problem than perhaps any other man in the country, reputed also to stand highest in favour with the tenants, and to ride terribly through the dreams of landlords, as one at whose very stroke another five per cent expires. His lay colleagues are naturally more silent. They are supposed to have been farmers or farming experts. One is a new appointment, and comes upon the bench to-day for the first time; he labors hard at his notes, and never opens his mouth save to ask for a repetition of figures which he has not caught. The other is slightly more lo-

quacious, but seems to show his chief interest in inquiries as to the distance of the "holdings" from towns, with an eye to his subsequent car hire.

The procedure strikes one as certainly not wanting in rapidity. The tenant who wishes to have a fair rent fixed is called, and examined by his solicitor regarding the size and position of his holding, the improvements he has executed upon it, and its general demerits apart from those improvements. The landlord's solicitor can do little but hang watchfully on the flank, ready if a chance offers to raise abstruse points of law. So, if the case be a commonplace one, the mind is dulled by a technical babble of thorough-drains and fences and reclamation of bogs and proximity values. Or if it be a little out of the common, the still more barbarous jargon of the Irish land code arises, and there is strange speech of future tenancies and town parks and demesne lands; and the table grows dusty with ancient leases, signed by peers dead long ago, till one's thoughts escape to the spacious days of the Regency as one reads the autograph of, say, the most noble, the Marquis of Steyne. But if the tenant makes by any means a *prima facie* case, that is, practically, unless he is upset on a point of law, the court will proceed to the next stage. And here is where the "wings" come into play. To-morrow the legal commissioner will go on to sit in the next town, taking to himself a new pair of wings. The pair who have sat with him to-day will go out to inspect the farms whose tenants have at this hearing established their right to an inspection and valuation by the lay commissioners for the purpose of fixing a fair rent. These experts go upon the ground in question, value it and the tenant's improvements, take into consideration the various multiple circumstances affecting it, "all the circumstances of the case, holding, and district," says the act light-heartedly, and then evolve what they, in conjunction with the legal commissioner, consider the rent

which ought fairly to be paid for it. This is the theory; in practice, landlords complain that the inspection is too cursory, and that the valuers tend to take their information too implicitly from the tenant. But somebody always will complain in Ireland, whatever is done; besides, if there be anything in the case, there will almost certainly be an appeal by one party or both, which is good for trade. At all events, the commission will sit here again on a future day, and announce the rent which has been fixed. Formerly it was blissfully free from the necessity of giving any reasons for its judgment, but now an unfeeling legislature compels it to give numerous reasons in the form of a schedule, so that the parties may be able to know precisely what they are grumbling at.

It may have been inferred that the Land Commission Courts are not looked upon with any great reverence in Ireland. Landlords, of course, regard their proceedings as

legalized robbery; tenants complain that they are not bold enough in carrying out the policy of the acts. Their composition, at times, has not been such as to inspire respect. There was one tribunal, for instance, whose chairman was particularly deaf, while its second member was irritable and snappish, and the third very irregular in his attendance. This body a witty Junior has characterized forever by defining it as "consisting of three members, one of whom can't hear, the second won't hear, and the third isn't here." But in the majority of cases the commissions are respectable, if sometimes mediocre. After all, they provide state employment for a number of deserving persons, they prevent legal business from becoming utterly extinct, they do something to relieve the tenants, and as for the landlords — well, they have something to grumble at.—*Pall Mall Gazette*.



(SUG)JESTIVE CASES.

IV.

CHARLOTTE JOHNSON *v.* ARTHUR J. GLIDDEN,
Supreme Court of South Dakota, 1898, 76 N. W.
Rep. 933.

FACTS.

It chanced that Earnest Glidden (defendant's minor son)
By hook or crook had come to have a double-barrel gun.
He sported it with glee; like death, he loved a shining mark;
He shot it ere the sun was up, he shot it after dark;
In short, he was a nuisance to the neighborhood at large,
And every day some novel prank was reckoned to his charge.
The loving father heard of these repeatedly; but yet *He* wouldn't interfere to spoil the pleasure of his pet.

One day, as Charlotte Johnson (the plaintiff suing here)
Led out her colt to water, she saw the youth appear,
Loaded for sport; and as the colt approached the watering trough,
The wicked boy discharged the gun close to his head; when off!
Off! went the colt like fun; and off, alas! went Charlotte too,
Though not a lass in such a way as friends would care to view;
For, somehow, round her ankles the treacherous rope got twined,
And suddenly she shot ahead, her balance undermined;
Then, head o'er heels behind the colt she followed fierce and fast,
Bound with the rope, expecting every moment was her last.
Anon she 'd gain her feet and almost grasp her captor colt,
And then her balance lose again, as off he 'd freshly bolt;
And while in this unequal yoke they scoured the prairie o'er,
And countless bumps had made each bone in Charlotte's body sore,
Defendant's Earnest boy stood by the trough and gazed thereafter,
And as he viewed the sportive sight, he doubled up with laughter.

Laughter, though loud, not long, for when — But let us draw the curtain
Over the scene with Pater that same night. But this is certain,
'Tis vain to lock the stable door after the horse is taken;
And Pater found he would have gained if only he had shaken
The nonsense out of Earnest ere he had made a targe
Of Charlotte's colt. The gun bore now an actionable charge;
For next day came a sheriff's writ, and then there followed fast
Court, jury, lawyers, plaintiff's tears, and so forth; till at last
The verdict found him guilty of the damage Earnest wrought;
And now he files exceptions in the court of last resort.

DEFENDANT'S EXCEPTIONS.

'Tis just and right (so Scripture runs)
On children's heads to visit
The father's sins. Yet if the sons
Have sinned, why, then how is it
About the blameless father's head?
Shan't every wild young duffer
Pay his own score? Or must, instead,
His dad be made to suffer?

The common law (we've thought) has said
The former view was right;
Hereon we pray this Court to shed
Its valuable light.

OPINION OF THE COURT OF SOUTH DAKOTA.

It's useless here to say your son's no agent, and all that;
You can't escape, by antique rules, the antics of your brat.
'Tis true, no law has penalized the fact of having sons;
But it's a very different thing to let those sons have guns.
It's up to you to settle, on the maxim of *Sic utere*,
And though 'tis true your boy, and not yourself, was here the shooter, he
Was yours to govern; you, *in re* your scion's deeds, are *sciens*;

And *nemo contra judices hoc auditur resiens*.
 You could, but did n't, stop the fun in Earnest;
 hence these weeps.
 So let the judgment down below stand here affirmed
 for keeps.

MORAL.

In South Dakota, courts may feign
 The common law is on the wane,
 And ban its primal curse;
 But, since this case, 'tis safe to say
 To those who in the old States stay,
 "Go, father! and fare worse!"

V.

JOHN JONES *v.* SARAH JONES, Supreme Court of
 Illinois, vol. 71, p. 562, 1874.

PRINCIPLE.

I.

If in expelling trespassers from one's own land
 Care is not taken fittingly to stay the hand
 Before excess is reached, a just and safe excuse
 May be entirely forfeited by such abuse.

FACTS.

2.

It seems that Sarah Jones one day
 To John Jones' farmhouse made her way;
 The record does not make it plain
 Why she should go, or why remain.
 At any rate she quickly found
 Her namesake did not want her 'round
 His premises; and he proceeded
 To tell her so.

But Sarah heeded
 Naught that John said or did; and so
 Began the tale of woman's woe:

3.

John first of all with heavy hand struck Sarah on
 the face,
 And then in wrath at finding that she stoutly kept
 her place,
 He kicked her out upon the porch; thence kicked
 her down the flight
 Of steps in front; this merely served to whet his
 appetite
 For further combat; so he dragged poor Sarah down
 the yard,

And pushed her through the gateway (still engaged
 in kicking hard);
 And eke two hundred yards he followed close the
 hapless Sarah
 With kicks and pushes sandwiched in amid her
 screams of terror.
 At last amid the shower of kicks she gained the
 highway fence;
 Then doughty John, still bent upon his task of self-
 defence,
 Took Sarah up and dashed her o'er to bite the high-
 way dust;
 Then he returned; reflecting on the troubles of the
 just;
 And as he tied his necktie, and plied the brush and
 comb,
 And picked the hayseed from his clothes, he sighed:
 "God bless our home!"

JUDGMENT OF THE COURT.

4.

Of course, the sequel was, she sued for damages for
 bruises;
 A gallant jury paid her well for all her sore abuses;
 Had John but stopped at moderate force, he might
 have won the issue;
 But, as it was, each kick became a trespass *ab*
initio.
 And furthermore, as penalty both suitable and trench-
 ant,
 The Court remarked that, since it seemed John's very
 ugly penchant
 For kicking folks had given rise to Sarah's worthy
 suit,
 The verdict here should bear indorsement, "Double
 costs to boot!"

MORAL.

5.

So men may boot, but women will weep;
 And the man will find that the bill is steep.
 Although the tradition of law may say
 That his house, is his castle, it does not pay
 To strain the maxim's maximum sense
 By kicking a lady over the fence.
 Too many cooks may spoil the broth;
 And too many kicks, when Jones was wroth,
 Brought him to grief.

Let us learn from him
 That "*molliter manus*" is plea too slim
 For a replication of "too much vim."

THE LAW OF THE LAND.

XV.

CHAPTER OF ACCIDENTS.

BY WM. ARCH. McCLEAN.

THE saying that accidents will happen in the best regulated families admits of various interpretations. It may be only a metaphor. The accident may be a black sheep, supposed to be in every family. The one who, instead of taking steps heavenward, runs a pace the other way, yet black sheep have their uses to show how human all of us are. There is no best regulated family which has been able to assimilate all the virtues, so that the surname stands but for an expression of them. When a family reaches that condition, the type is generally a Pharisee. The family possessed of a belief that the accident is an impossibility with them is the family that will soon run upon a streak of the blood of the old Adam in their veins.

The accident may be no more than a family skeleton we are all supposed to have closeted in our castles. It may be a thing related to the black sheep, except instead of having vitality and life, it has only bones, something to scare children with, to frighten them into being lambs. We cannot all be lambs, if we were they would be a drug on the market. The existence of lambs necessitates some one to do the shearing. A skeleton is the past tense of which black sheep is the present and future tense. Their uses are supposed to be the curbing of the pride of families, as Saxe puts it,

Depend upon it, my snobbish friend,
Your family line you can't descend
Without good reason to apprehend
You'll find it waxed at the farther end
By some plebian vocation.
Or, worse than that, your boasted line
May end in a loop of stronger twine
That plagued some worthy relation.

It may be some family has been attempted to be so regulated as to eliminate the possibilities of an actual bodily accident. It is curious, however, how these attempts overshoot the mark, and how things in this world go by reverses. There are mothers who will not let children be children, run and play, for fear the darlings will perspire and catch a cold, or become short of breath and have heart disease, or meet with some other accident. They had heard of this, that and the other thing, and they shake their heads, saying, "No, no, no." These are the children reared like hot house plants, indoors in sight of fond mother and out of reach of harm. Let such a child walk abroad, and we all have known of such incidents, and let a brickbat be hurled into the air by some other child, singing, "Whatever goes up is sure to come down," while all other children will get out of reach of harm's ways, the hot house plant will, in spite of fate and his rearing, get under that descending brick if there is any way to do it. They never go out of doors without stumbling over their own feet or something else, being bitten by a dog, tearing their clothes and disfiguring themselves, while other little ragamuffins, whom fond mothers pity, go through perilous childhood scot free from accident. The pity has been wrongly placed. There comes a time when fond mothers cannot make life smooth. Then the little ragamuffins step as gingerly through such times as their bare feet once missed broken glass and rusty nails, while the hot-house plants watch the performance. Of course it is not meant to insinuate that one's parents ought to turn loose their young to grow up like ragged robins, but it is simply

an illustration that there are accidents and accidents.

Man's life is hemmed around with accidents, episodes in which the hindsight seems so much more of an elaborate affair than the foresight. Events which one's own carelessness and thoughtlessness have helped to bring about, or frequently some one else's. Happenings that have proceeded from some unknown cause, as utterly impossible to fore-know as that that beautiful curve from the pitcher's box was to be a foul tip off the bat, which was to describe an arc of a hundred yards and land on your proboscis. Or they have proceeded from known causes accompanied with unusual effects. You may have been the umpire of the home team and handed down a more than unusual unrighteous decision, which you knew would make trouble with the accompaniment of bats and other things hurled at you, which you would not always be able to dodge.

Accidents are usually the unexpected. One half of the definition of faith may aptly apply to that of accident — the evidence of things not seen. While faith may lend a meaning to accident, it is not to be inferred that there is to be any return of favors on the part of the latter word. Come to think of it, however, the accident of birth has a great deal to do with the character of one's faith.

The age we live in is continually being reduced to an epigram. Here is another. This is the age of insurance. One can insure his own life for the benefit of his wife, children or creditors, or he can insure the lives of his wife, children or creditors for his own benefit. He may insure himself an endowment for his old age or a cash surrender value for the times when he may be hard up. He can insure his home and property against the elements, fire, water and air, against the accidental fire, the fire from lightning, and the fire of criminal origin, against the water donated in the attempt to outen the fire and against the freaks of air in cyclones, torna-

does and simoons. He can insure his own honesty or the honesty of his employees and servants. He may insure his title to lands against the flaws and technicalities which the legal world may pick in the same. He may insure his beasts of burden, his keys and packages, even those of his wife containing the new hat, etc. This idea of protecting one's self against the contingencies of life has seized upon the life of the people. Any new method to take money out of the pockets of the people for purposes of insurance that are laudable and those that are not, need only be suggested to have a company formed to develop it.

It is not surprising then to find a large amount of insurance in force against accident to life and limb. It has come to be a fact with much insurance, that it is given a name which is supposed to cover a multitude of enticing virtues, but is an attempt to get as much of one's money for as little as can be given in return, which admonishes one to always look close to the terms of the policy, for there be invidious distinctions.

Webster defines the word "accident" as an event that takes place without one's foresight or expectation, an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected. Or, as expressed by a court in elucidating this definition, an accident is an event happening without any human agency, or, if happening through human agency, an event which under the circumstances is unusual and not expected by the person to whom it happens. That is what an accident means to you and to me.

Insurance companies however, in the desire to insure themselves against paying the amount nominated in the bond paid for, insert limitations to the definition, such as that the policy does not cover "intentional injuries inflicted by the insured or any other person." The first part is proper, for intentionally self-inflicted injuries are not to be encouraged, but "or any other person" gives

a broad gauged road of escape to the insurer. Any accident through human agency unusual and unexpected to the person to whom it happens may have been intended by the human agency inflicting it, and proof of such intention is a complete defense. It would be against the public welfare and morals to permit an insured to hire some one to chop off a hand, or gouge out an eye, or saw off a limb, and then compel an insurance company to pay for an accidental injury. But to be murdered in cold blood with malice aforethought, being a very unusual and unexpected event to the person to whom it happens, and then have the insurer defend on its policy that the murderer intentionally took your life is a *reductio ad absurdum* as far as protection from accident is concerned. Accident insurance containing such a clause is more or less a misnomer. As a fire is not a fire when caused by lightning, and there must be a lightning clause in your policy, so when you buy your accident insurance be sure that it contains an intentionally murder clause.

An illustration of the kind of insurance noted is the following: Insured was employed as a coal heaver in a coal shed where he was to spend the night with a companion hoisting coal. The night was very dark, it thundered and lightened and rained. The two worked continuously until eleven o'clock with their backs toward the railway track upon which the coal shed opened. There were two lighted lamps near them. When they had partly raised a bucket of coal and, so far as it appears, when they were utterly unaware of the presence of any human being, they were startled by a pistol shot which sent a bullet crushing through the brain of insured and followed by two other shots. The shots proceeded from open side of shed next railway track. The evidence was sufficient in the opinion of the court to show that the assassin intended to shoot the insured, and that when shooting he knew that he was shooting him and intended to kill. He did

not direct his fire at the companion but selected his victim, followed it with two other shots, evidently aimed with murderous intent, and when he stood near enough to his victim to quite touch him with extended hand, the insured being burnt about the face with powder. The court asks, is it not a just and reasonable conclusion that the assassin recognized and had no doubt of the identity of his victim? There is no evidence, fact or circumstance tending to show or even suggest that the death of insured was accidental within the meaning of his policy, that it was not an intentional injury inflicted by the insured or any other person.

With courts, however, there are distinctions within distinctions just as there are in this world wheels within wheels. Another court reviewing a killing where policy did not cover a death by accidental means which was the result of design either on the part of the insured or any other person, reasons if a person should draw a pistol in a crowded street and deliberately fire the same with the intent of killing some one, there would undoubtedly be a design to kill or wound some one but no design to kill or wound the particular person injured. Suppose for purpose of plunder a passenger train was derailed, knowing such an act is liable to kill or injure some one but having no design to kill any particular person and the insured is killed, can it be said that his death was not accidental? Suppose one fires a pistol in the air. He fires by design but does not intend to kill any one. The shot strikes the insured and kills him. The act which causes the death — shooting of the pistol — is designed and therefore not accidental, but the killing is certainly accidental and not designed. If the pistol is fired at one man and hits another, is it any less accidental as far as the person hit is concerned or the mind of the person who does the shooting? And if the shot is fired at the insured in the belief that he is another man, is not the character of the act the same? The death of the person thus killed must be con-

sidered, as far as he is concerned, an accident.

The circumstances under review were the killing of a man by an officer, who had been ordered to arrest him. The man came to a door, said nothing, did not throw up his hands when commanded. The officer fired, then entered the room in which the man had been whiling away the time with several companions with the pasteboards as men will do. There was conflicting evidence on the point whether the officer knew the man he shot. He contended he did, but another witness said that the officer after entering room pointed his pistol at a third man saying, "You are B. U.," to be told "No, you've killed your man." The court held the case was for the jury to decide whether the officer knew the man he killed at the time he fired the pistol shot, that if he did not know the man he fired at was B. U. though he was the one man to be arrested, he did not intend to kill him, hence it could not be said that the insured lost his life by the design of the officer.

When your accident policy provides that it does not insure from intentionally inflicted injuries and no words are inserted indicating a third person, an injury intentionally inflicted by another is not included. In such cases the courts will hold that the word intentionally refers to the insured alone. When in this shape your policy contains the murder clause and you may permit yourself to be murdered with impunity.

When anything happens to you and you carry an accident policy you can rest assured that the law will be on your side unless you leave unquestioned proof that you shuffled off your own coil. A man about to be injured is not expected to gather together his witnesses to see the act done so that he may clearly prove it afterwards to the insurance company. Courts have refused to give countenance to conditions in policies requiring proof of exact manner of the occurrence of the injury. So should you be sent home, as a certain railroad conductor was, a mass

of bruises, but without the proof of the manner in which they were inflicted and you depart into some other bourn before you have had the chance to explain, your beneficiary will not be compelled to explain unknown circumstances. Proof of bruises or wounds causing death will be held to make out a *prima facie* case of death from bodily injuries through accidental means, the presumption that they were accidental being on your side. Further the legal presumption is that you did not intend to do yourself any harm—to suicide—and that no one else intended to injure you but that the injuries were accidental. Again the court will say that your policy is to be liberally construed in favor of the insured, yourself. The insured has paid his money, the insurer has taken the money, and if there is any legal way to compel the insurer to give that which has been paid for, it will be done.

But what is an accident so that you may know it when you make its acquaintance? Or what has been adjudged to be an accident so that you may know what the thrilling experience is in the terms of your accident policy? The majority of mortals believe that to die is the greatest accident, but dying is just as natural an everyday occurrence as living. True, it often takes place through disease and infirmities that flesh is heir to, and might be said to be without any human agency. It is a very unusual, unforeseen accident, as it were, as far as you are concerned, the only experience of your life you do not live through. Once is enough for you, for you are no cat with nine lives. You may look upon it as a supreme accident whenever it occurs, but as it is given to all men to die once, legally the fact of death is no accident. It is the manner in which you die that determines whether it be accidental.

There is a unique case upon newspaper authority. One traveling in Kentucky was bitten so severely by a native, to the manor born, mosquito that he died. It seemed to the beneficiary under his policy that this was

an accident. That it was without human agency, though brought about by that which lived on human blood. It was the unusual and unexpected. The man never dreamt of meeting that mosquito in mortal combat. He had doubtless had many encounters with others of the same enemy whom he had vanquished. He doubtless had known his enemy generally and specifically, from the common ordinary buzzer that abounds everywhere, to the great, aristocratic Jersey, but he evidently had never been to Klondike or met a Bourbon. It seemed to the insurer that any mortal who was so thin-skinned, so delicate, so weak and infirm as to let such a thing as a mosquito do him up, died from causes that were not accidental. The court held that that bite, at the right time, in the right place and by the right mosquito, was an accident.

Whenever you are waylaid and assassinated for purpose of robbery, whether it is in Chicago or in the remains of the wild and woolly west, your death will be by accidental means. There will be surcease for the sorrow of your beneficiary.

If a mob hang you by the neck by reason of some mistaken identity, or out of some passing humor which did not deserve hanging, your death will be through accidental means, though it has the appearance of a rope.

If you try to eject some one from your castle, or from the hotel you own, who was ordered to go and did not do so, and you are shot by the one being ejected, it is an accident. In fact, all wilful murders, premeditated murders and manslaughters are accidents, unless your policy says something about intentionally inflicted injuries by third persons.

If you are a somnambulist and crawl out of windows, walk on the edge of roofs, and do the many other difficult feats one can only do when asleep, such, for instance, as while traveling by railway you arise out of

your berth, walk to the car platform and step off into space, it is no self-inflicted injury, but an accident pure and simple.

If you, in a state of mental aberration, kill yourself, you do not know what you are doing. You are not conscious that you are going to do an injury to yourself. You would never do it if you were in a condition to take a second thought. You are not accountable, and unless your policy provides for suicide while insane there is the highest authority that an insane suicide no more dies by his own hand than the suicide by mistake or accident, and that bodily infirmities and disease do not include insanity.

If you should meet with an accident that was not sufficient to kill you, as a wound or blow on the head, but that leads up to another, by which you tumble off of a bridge into water where you are drowned, your death is only doubly accidental. Or should you be subject to the infirmity of epileptic fits and hence are not able to choose the spots in which to have them, and you are seized while in the waters of a brook and drown, death is not due to the epileptic fits. It was the cause of your being in the water in a helpless condition; but the fact of being drowned while in such a condition is an injury by accidental, external and visible means. Drowning is always death by accident unless self-inflicted, and the same is true where death occurs by taking poisons by mistake.

Fright is an accident. It is the unusual, the unexpected. You may mean to frighten some one else but you never meant to let yourself be frightened. It is all right to jump at some one else but all wrong to be jumped at. It is thrilling to behold some one in danger, but it is being thrilled to be in danger yourself. If your horse becomes frightened at an unsightly object and runs away, though you succeed in bringing him under control without being upset or coming in contact with anything, yet the excitement, or fright, or strain is such that you die an

hour afterwards, death is caused by bodily injuries effected through external, violent and accidental means.

Just what is external, violent and accidental has been the source of a divergency of judicial opinion. One court being of the opinion that where there was no outward and visible signs of injury and violence by which insured accidentally came to his death, it was not through external, violent and accidental means, and prevented recovery in the case of a beneficiary of a physician who drank by mistake water from a goblet in which was some poison. The more general judicial opinion, however, is that poison by mistake in a glass, or gas in atmosphere, is an external cause and is a violent agency in the sense that it worked upon the insured as to cause death. That a death is the result of accident or is unnatural, imports an external and violent agency as the cause.

Where policies are worded so as not to apply to the taking of poisons or inhaling of gas they do not mean exactly what they say. If you register at a hotel and wake up dead by reason of accidentally breathing an atmosphere full of illuminating gas, there will be a recovery, though your policy excepts death by inhaling gas. You may have been a back number and blew out the gas imagining that it was a tallow dip. It was an accidental not a conscious act. In order that insurer shall not be liable for a death by inhaling gas means a voluntary and intelligent act by the insured and not an involuntary and unconscious act. Of course you inhaled the gas that put you so soundly to sleep but it was not an act of volition; if you had been consulted you would have preferred inhaling the odor of new mown hay.

One court has well classified the various legal kinds of accidents. They are divided into two large divisions. First, those that befall a person without any human agency, as being killed by lightning or having a mad dog give you death by rabies, or being laid

low by a mosquito. Second, those that are the result of human agency.

The latter class are subdivided into four kinds. First, that which happens by your own agency, as if in walking or running you accidentally fall and hurt yourself, or as when absent-mindedly dreaming in the gloaming you make the acquaintance of a door partly ajar. Second, that which happens by the agency of another without the concurrence of your will, as one on a scaffold unintentionally letting a brick fall from his hand to strike you below on the head. It may have been Patrick adjusting his pipe who let the brick loose out of his hod. Third, that which a person intentionally does whereby another is unintentionally injured, as firing a gun intentionally into the air and accidentally shooting you. The intentions are all right but the careless and thoughtless unintentionations are all wrong. Fourth, intentional injury you receive which was not the result of rencounter or misconduct on your part but was unforeseen. The court of but one state in these last days of the century could have used that word "rencounter" so significantly and naturally. Other courts would have chosen homely, ugly-sounding words to express the same idea. Can you locate it? It could only have come from the haunts of that Bourbon mosquito.

Accident policies usually provide against injuries resulting from voluntary exposure or unnecessary danger. It is the business of the company to sell you a policy with as many conditions in it that can be put in and still have a marketable residuum. It ought to be your business to get your money's worth of chances, for it is doughnuts to dollars that it will be your luck not to make the intimate acquaintance of an accident until the day after the expiration of your policy, hence while it is in force you want it as broad as it can be bought.

You are traveling and your train stops on a bridge. All the male passengers as usual

step off to interview the brakeman and tell one another what's the matter. You fall through a hole in the bridge. It is an accident and is no voluntary exposure. But if you walk home over a dangerous railroad trestle and fall through, when you could have gone home by a safe path, or you sit down on a railroad track in front of an approaching engine, you are reckless because you are insured and your beneficiary may lose that which you paid for, on account of your voluntary exposure or unnecessary danger.

Another loop hole by which accident companies forearm themselves for escape is by providing against the results of unnecessary lifting and voluntary overexertion.

In a recent case an insured was helping to arrange for an amateur entertainment in which a supposed strong man was to take part. He was to lift dumb-bells supposed to weigh from 300 to 450 pounds. The insured saw some boys playing with these heavy weights. It appeared to him the weights were not what they seemed to be or were lettered. In the laudable purpose to prevent a fake exhibition at the entertain-

ment he proceeded to test the dumb-bells by picking one of them up. It seemed easy enough to do so, but while they were in his hands something gave way in his back permanently injuring him. The defense of voluntary overexertion according to the terms of his policy did not avail, the court remarking that an accident policy undoubtedly contemplates that even a capitalist will do some lifting without physical or moral compulsion.

It may be the better part of wisdom not to be a participant when accidents are running around at large seeking whom they may devour, if for no other reason than that you will never know until it is over what the exact nature and character of the incident will be. If, however, you must be in at the death, if you must be a hero, — and the world is in need of heroes at all times and in all places, — it is also the better part of wisdom to have a policy upon which recovery is possible, for your beneficiary will have more respect for your memory if she recovers a judgment in place of paying costs for a failure to do so.

CHAPTERS FROM THE BIBLICAL LAW.

IX.

THE TRIAL OF ACHAN BY LOT.

BY DAVID WERNER AMRAM.

IT is well known that among the Hebrews, God was supposed to be present in the Courts of Justice, and judgment was pronounced in his name. The trial of a case, therefore, partook somewhat of a sacramental character. This was due, no doubt, to the fact that, at a certain period in the history of the people, the offices of priest and judge were united; and people went to the priest to decide their disputes, even as they went to him to guide them in religious matters.

It is also well known that divination and

sorcery in their various forms were practiced, and that decisions and opinions obtained by these means were given by the priests. The common method of obtaining a decision was by casting lots. "Chance" was not deemed fortuitous, as with us, but was supposed to be a direct result of divine action. Hence, the casting of a lot, when done by one in office, was supposed to be an expression of divine will, and gave the issue in doubtful matters.

A remarkable instance of the use of the lot in the determination of a question involv-

ing life and property is furnished in the recorded case of Achan, in the seventh chapter of the Book of Joshua. The circumstances of the case are as follows :

After the City of Jericho had fallen, the entire city with all its inhabitants, and with all the property contained in it was ordered to be destroyed. It was "*Cherem*," that is, devoted to God. The idea underlying the word *Cherem*, was not so much that the objects were devoted to God, as that they were not devoted to man ; in other words, that man had no right to use or enjoy them. It is recorded (Joshua vii. 21), that the Hebrews "utterly destroyed (devoted) all that was in the city, both man and woman, young and old, and ox and sheep, and ass, with the edge of the sword." It seems, however, that one Achan had secretly appropriated some of the spoils of the devoted city. As a result, Jehovah is said to have been angry with the people, and to have withdrawn his favor and assistance from them, so that they could not maintain themselves against the foe.

Joshua, having been informed of this fact, determined to ferret out the offender and punish him, and thus regain divine favor. The problem presented no difficulties to him. He did not depend upon human testimony for the purpose of discovering the criminal, and he therefore notified the people, "Sanctify yourselves for the morrow, for thus saith Jehovah, the God of Israel. There is *Cherem* in thy midst, oh Israel ; thou canst not stand before thine enemies until ye take away the *Cherem* from your midst. In the morning therefore, ye shall be brought according to your tribes and it shall be that the tribe which Jehovah shall seize shall come according to its families ; and the family which Jehovah shall seize, shall come by households ; and the household which Jehovah shall seize, shall come man by man ; and it shall be that he that is seized with the *Cherem* shall be burnt with fire, he and all that he hath, because he has transgressed the covenant of Jehovah, and because he has wrought folly in Israel."

Jehovah himself was going to discover the offender by a means which is not fully expressed in the Biblical record, but which appears clearly enough.

At the central sanctuary of the camp, the priests were to cast lots for the various tribes of Israel, and the tribe which was "seized," that is to say, which was marked by the fatal lot, was to be balloted for according to its families and the family according to its houses ; and the house according to its members, one by one ; and thus the lot would ultimately fall upon one man who would thereby become known as the offender.

Skeptical critics see in this method of discovering the offender, merely a piece of chicanery on the part of the priests, who are presumed to have discovered the real offender by more natural means, and to have resorted to this remarkable method of discovering him merely for the purpose of overawing the people and strengthening their own power over them. This, however, is a very crude criticism. It is more likely that the determination of the offender by lot was really resorted to so as to obtain a confession from the guilty person through fear. However it may be, this procedure was followed, and the lot eventually fell on Achan, the son of Carmi, the son of Zabdi, the son of Zerah, of the tribe of Judah.

Had this method of fixing the guilt on the real offender been believed to be unfailing, Achan would immediately have been put to death. The record, however, shows that Joshua was by no means convinced that Achan was the real offender, and he said to him, "My son, give, I pray thee, honor to Jehovah, the God of Israel and make confession unto him, and tell me now what thou hast done. Do not hide it from me."

Joshua, from his general experience in warfare probably knew that it was no uncommon thing for soldiers to appropriate some of the spoils of war, and that, in all probability, many of his soldiers had offended in this manner at the fall of Jericho. To make an

example of one was deemed sufficient, and Joshua no doubt felt satisfied that, if the lot fell upon one of those who had been guilty, a confession of guilt would eventually follow. It was therefore unnecessary for Joshua to compel Achan to confess by threat. His simple request for information was followed by a full confession, "And Achan answered Joshua and said, Indeed, I have sinned against Jehovah, the God of Israel, and thus and thus have I done. When I saw among the spoils a goodly Babylonian cloak, and two hundred shekels of silver and an ingot of gold of five hundred shekels weight, then I coveted them and I took them, and behold they are now hid in the earth in the midst of my tent; and the silver under it." Joshua thereupon sent messengers to Achan's tent and discovered the articles which he had described, and then there was meted out to Achan the punishment for his offence, in accordance with the law of the times which "visited the iniquities of the fathers upon the children."

According to the old patriarchal notion, the family was a unit and its members were held responsible for the conduct of each other. Hence the children suffered for the crime of the parent and *vice versa*. Under this fierce law, a crime resulted in the blotting out of an entire family, and it was not until late in the time of the Kings that a more modern notion of the nature of crime prevailed. The individual was made responsible for his acts, and the family was no longer compelled to suffer for the crime committed by any one of its members. The old notion, however, of the solidarity of the family has not entirely died out, even in our own day.

It expresses itself very often in social ostracism of the innocent members of a criminal's household. Modern society unconsciously testifies to the old belief, that blood relationship attainted all those who were connected with the real offender.

Joshua then proceeded to execute the sentence of the law and he took Achan and the silver and the cloak, and the ingot of gold and his sons and his daughters and his oxen and his asses and his sheep, and his tent and everything that he had, and brought them up to the Valley of Achor, and there Joshua said to Achan, "As thou hast troubled us, Jehovah shall trouble thee this day; and all Israel stoned him with stones and burnt them with fire, and stoned them with stones, and they raised over him a great heap of stones unto this day."

Although Joshua and the people of Israel were at that time conducting a great military campaign in the enemy's country, they nevertheless observed an old custom in the execution of criminals. No criminal was put to death within the boundaries of the town in which he lived; he always was taken outside of the town, into some deserted place, and there executed.

Later on in the history of the Jewish people, the larger towns had a regular place of execution outside the walls. The place was shunned by the people, just as the people in our days, shun the gallows tree.

In this case, Achan was taken outside the camp to a neighboring valley, and there, together with his entire family and property, was destroyed.



THE PENOBSCOT INDIANS.

BY GEORGE J. VARNEY.

ALL persons who are conversant with the pioneer history of New England are aware that hostilities between the white settlers and the Indians, in that period, were frequent and sanguinary. For nearly one hundred and fifty years, since, — even to the closing decade of the nineteenth century, the two races had lived in peace, — when war again arose between them within the territory of the Tarratines.

At the time of Captain John Smith's visit to New England, in 1614, the population of the region now known as the State of Maine was estimated to be about thirty thousand; and of the four tribes, the Tarratines, occupying the Penobscot River region, were far the most numerous and powerful.

The seat of the recent disturbance is up the Penobscot River, where the remnant of the powerful old tribe occupies one hundred and forty-six islands, — extending from Oldtown (which is some twelve miles above Bangor) to the town of Lincoln, — a distance of nearly forty miles.

The four townships reserved for these Penobscot Indians by the treaty of 1819 with Massachusetts (accepted and assumed by Maine in the following year, when she was separated from the former) were sold many years ago, and the proceeds have since been held by the State as a fund for the benefit of the tribe, the legislature annually appropriating a sum for educational, religious and economic purposes. The Indians on the reservation are not taxed, neither do they vote on other than their own internal affairs.

When the townships were sold, the tribe was required to reside in the remaining portion of its territory, — the islands in the Penobscot. The location was regarded as specially suitable to the wants of these Indians, both by the state authorities and by

themselves. Some of the islands are very fertile, and all furnish abundant fuel, — an essential article in the long northern winters, — either by natural growth or by drift on the shores. The chief village of the red men is on Indian Island, — sometimes called Oldtown Island, from being opposite a village of that name, belonging to the white people.

At the period when the Gulf of Maine was first explored, the French voyagers gave the name *Norimbeague* — since become *Norumbega* — to the region along its northern side, and the Penobscot was known as the "river of *Norumbega*." The belief was prevalent that a magnificent semi-barbarous city, bearing the same name, was located somewhere up the "great river." Its site was even laid down on one noted map — that published in Antwerp in 1570. Not a few adventurous voyagers — French, Dutch, English, Italians and Portuguese — listened with interest to tales of its splendor. Whittier, in his poem, "*Norumbega*," has presented the pathetic story of one of these, a Norman knight, who perished in his attempt to penetrate to the mysterious city. As the shadows of evening fell upon his dying couch, his face lighted up, —

"I see," said he, "the domes and spires
Of *Norumbega* town."

When, years later, the *Sieur Samuel Champlain*, in the service of France, sailed up this lordly river, he found "under the hemlocks on the shore" the grave of the luckless explorer.

Our definite knowledge of the Penobscots or Tarratines begins about the time (1660–1665) that Baron Castine came among them, married the daughter of the chief sachem, Madockawando, and finally settled on the high peninsula on the east side of the bay, which has ever since borne his name.

Madockawando was the first of the head chiefs of whose name we are certain. He was succeeded by his cousin Wenamovett—who also bore the names of Wenogget and Wemenganett. Another, Mugg, was frightfully active in the period of the first and second Indian wars—1675 and 1688–91. Six head chiefs filled the period from the middle of the eighteenth to the middle of the nineteenth century. These were Tomer or Tomasses, "Squire Osson," Orono, Aitteon, Lolan and Aitteon, 2d.

Osson, who was commissioned justice of the peace, died in his eighth year in office, at the age of 100 years. One of the islands of the tribe bears his name. The "good Orono" was said to have been a grandson of the elder Baron Castine. He was a zealous Catholic, and, with all his people, was loyal to the Americans throughout the Revolutionary war. It has been said of him that he was a hunter in three centuries,—having entered his rest in 1801, at the age of 113 years. His squaw—addressed, by courtesy, as "Madame Orono"—died eight years later, aged 115 years. An island of the reservation and the State College town near by on the river, were named in his honor.

The common Indian often has very indefinite ideas in regard to age and time and, indeed, as to number, when this is large. A gentleman visiting Oldtown a few years ago met a garrulous old fellow who confessed in modest manner to being very old.

"How old are you?" asked the visitor.

"O, eighty-two," he replied.

The respectful manner in which the querist scanned his features encouraged the Indian to add,

"My father was very old, too. He was seventy-seven!"

"When did he die?"

"Four years ago."

This aboriginal genealogist followed up this data—which he observed had made quite an impression—with the statement that

he himself had some Mohawk blood in his veins. This nation was greatly respected by the Tarratines, no doubt partly from the victorious raid of a war party of Mohawks through the Penobscot region eastward to the Schoodic Lakes, where they were met by the St. John and Quoddy tribes, and a great battle was fought. When our descendant of heroes was questioned as to how an Indian of this strain of blood came to be a member of an Indian tribe on the Penobscot, he explained that it was through his aunt's husband. There is no doubt, however about Orono's great age.

Aitteon, who succeeded him in the chieftainship, was a grave and silent man, and of considerable ability. He made a trip to Boston by water in 1811, and died by his own hand on his return. His successor, Joseph Lolan, a very weak man, was said to have owed his election to his handsome wife. In 1816, the tribe adopted white men's titles for their head officers, and elected John Aitteon, son of the former chief of that name, as "governor."

The new head-man was of handsome and commanding person, but of little ability. Sometime after he had assumed office, his wife confessed to a temporary aberration of her affections from him; the lieutenant-governor, John Neptune, being the partner of her liaison. The latter was a full-blooded Indian of much ability. The two officials met and fought with knives, but were separated without either having suffered any serious wound. For years the tribe found it difficult to keep them from renewing the conflict, and became divided in regard to the proper course to be pursued in reference to this public scandal and disturbance.

The hostile chiefs finally became reconciled, but they were still unable to quiet their people. One party desired to remove both the men from their offices, but there was an opposing party nearly equal in numbers. The kindred tribes, the Indians of Passamaquoddy Bay and the St. John river,

were invited by the party devoted to good morals, to send delegates to assist in establishing a better government on the Penobscot.

In 1838 twelve delegates from the St. John and twenty-one from Quoddy met their brethren at Oldtown, to assist in deposing the unworthy rulers,— one for his crime, the other for its condoning. Neptune himself was the principal speaker in opposition to the movement. The following are extracts from a portion of his speech which has been preserved :

Brothers, we boldly come here. We face the storm. We fear not, for our hearts are firm as rocks which never move.

There is extant only the briefest summary of the body of his address. He said that twenty-two years before, he and Aitteon were elected governors for life, according to Indian usage. His address closed with this passage,— very shrewd in its pathos and covert threat :

Will brothers turn to bears, to tear us in pieces? Come they here to dig our graves before we die? Then is our end come. Soon will white men push us off to drown. The Great Spirit sees it. His eye is over every star. He knows all things. Yes, He knows John Neptune has the soul of his father,— Never-Afraid. He will never turn his back to fighters,— brothers or bears. *He is sachem for life.*

The Quoddies had an orator also,— Sabbatis Neptune. His reply to this sturdy and obstinate offender was in part as follows :

We come here, a great way from home, to hear what our brothers speak of John Neptune and his party friends. Many say he drinks a great deal of strong water; then his words very loud; his eyes flash fire.

The accuser next devoted some time to the evidence of Neptune's many social immoralities, which he denounced vigorously. His closing sentence was, "Aitteon and Neptune are joined together."

When the vote was taken, it was found that a majority were against the chiefs, and

they were accordingly declared deposed. By other votings, Tomer Soc Alexis was elected governor and another Aitteon, son of John Osson, was chosen lieutenant-governor.

Yet the matter was not settled; the "unwritten constitution," upheld by the bold and strong, prevented a change in the offices, and the flags of the rival factions continued to fly. There was much bitter feeling and excitement, but, finally, a letter from the governor of the state sent the delegates home.

The legality of the election being disputed, the legislature of Maine, in 1839, passed an act which authorized the male Indians of the Penobscot tribe, of lawful age, to elect a governor and a lieutenant-governor, to serve two years, and until successors were chosen. For a long time attempts were made to elect under this act, but always the minority insisted on having its way, and, with the two old chiefs, it proved, every time, to be the stronger party. After the "gubenor" quarrel had continued many months, the disturbance was ended by a vote that the old chiefs, Aitteon and Neptune, should remain in office during their lives, and that after their decease the governor and lieutenant-governor should be elected annually. The moral triumph consisted only in a constitutional change by which hereafter misconduct in office could be brought to judgment with reasonable promptness. A curious provision of the law, which explains the result of the first election under it, is that that which was known as the "old party" should first choose the governor, and the "new party" have its turn at the next election.

The process of inauguration in its present degree of modification may be apprehended by a newspaper report of the one which occurred in the evening of January 4, 1899. It took place in the hall of the reservation at Indian Island. "The oath of office," says the report, "was administered by Francis B. Sockalexis, ex-governor. The oath and the address of the governor were spoken in Indian, but were

interpreted by Frank Loring, known as 'Big Thunder,' the Nestor of the tribe." This ceremony was followed by social festivities, including the short-horn dance, snake dance and others.

A gentleman whose youth was spent in the neighborhood of these Indians, writing for a religious journal in 1853, says:

As we remember him [John Neptune] in our boyhood, he was one of the handsomest and stateliest-looking red men we ever saw. With the weight of eighty-seven winters upon him, he is still noticeable for good person and dignified air. In middle life his understanding, intelligence and sagacity were equal to the performance of almost any service.

In 1817, the next year after Neptune's election to his office, he appeared in court at Castine, and addressed the judges of the Supreme Court of Massachusetts in mitigation of the sentence of Peol Susup, an Indian of his tribe who had murdered a white man, William Knight, at Bangor. Though Neptune was then young, it is recorded that his bearing was calm and dignified, and that all who were in the court-room listened with profound attention to his argument.

"You know," said he, "your people do my Indians a great deal of wrong. They abuse them very much,—yes, they murder them; then they walk right off,—nobody touches them. This makes my heart burn."

Peol Susup, the convicted murderer, appears not to have been of pure Indian blood. He was a person of firm mind and fierce passions. A year subsequent to his crime, some who had seen him in their youth looked upon him in his prison. The writer has heard from more than one of these, when they had become old people, a description of his appearance there. The face of the dark red man was "bleached almost to whiteness, his long black beard tangled and knotted, and his glaring eyes deeply sunken,"—was the relation of one visitor. They noted, too, his hurried pacing across his cell, his coming

to and retreating from the grate, "his moan, like a child, and his shout like a madman."

At what date Susup died is unknown to me, but in 1852 his widow was the wife of the aged Neptune.

A reminiscent native of the vicinity of these Indians (who was called by them with characteristic descriptiveness, "preachman's papoose") says:

We recall a time when drunken Indians were the terror of all the river towns; when children were chased in the road, or driven from home or the school-room. We have stood by our own mother, with the little flock clinging to her knees,—pale, motionless, horror-stricken,—when, with drawn knife, the red maniac yelled out, as he staggered to reach the little group, "Lum, lum! Me speak lum. You no stamina?" [Rum, rum! I call for rum. Don't you understand?] More than once was our parental fire-side invaded by a Penobscot in this wise; and by the inebriate, who, too helpless to attempt harm, fell dead drunk upon the floor; there coiling himself up as no one but an Indian can do, to sleep off his debauch; while the mother and children, tearful and sleepless, watched the night through for manifestations of consciousness, and of the terrible outbursts of ferocity which always marked the first hours of returning sobriety.

Yet the drunken Indian is merely a little more crass and cruel than his superior, the white man, of similar habits. For half a century, however, such scenes have been increasingly rare. First, the Washingtonian temperance movement reformed the drinking usages of the more thrifty and respectable people of the State; then the stringent liquor laws operated to establish abstinence as the usual habit among the lower class.

Old people of the Penobscot and eastward regions will sometimes tell of the occasional breaks of the milder inebriates of a later period, but of few instances of violent or threatening behavior. One Indian governor is remembered who, when in his cups, sometimes perambulated the streets of Bangor, or of the villages, dressed in his military

uniform, or — when in milder mood — clad in more fantastic aboriginal finery, always with a troop of idlers at his heels. There were also a father and son, both confirmed drunkards, cross-eyed and barefooted, — fiddlers, and the wags of their tribe, who frequented the river villages, always attracting about themselves a hilarious crowd, and gathered in many a loose penny.

The policy of the Maine government toward the Indians is paternal. In 1894, the amount of legislative appropriations was \$8,419.70, which is about the usual annual amount. This included the interest of the fund standing to the credit of the tribe. The items consisted of annuities (\$1,700), seed, and often farming implements, bounties on crops, support of schools and school-houses, salary of the priest, governor, lieutenant-governor, superintendent of farming, and of financial agent.

In January, 1880, the membership of the tribe had fallen to 245 persons; in January, 1894, there had been an increase to the number of 390. Apparently civilization, qualified by Maine law, is not destructive to the race.

Beside the school at the Oldtown Island, there is one on Olamon Island, opposite the town of Greenbush. The old school-house at Indian Island having fallen into decay, in 1894 a new one was built at a cost of \$1,000, of which sum the State provided \$400, and the Indians contributed the balance. The new school-room is furnished with blackboards, globes and maps; and it is stated that there are always a number of pupils in the school who are quite proficient in drawing. The teachers for many years have been young squaws. These are, for the most part, modest and dignified in demeanor, and some have been persons of refined appearance.

It was nearly a century ago that their aboriginal costume gave place generally to a transitional form of dress, — a mixture of the French Canadian, the English and Indian

styles; but now for many years these garments, — the three-cornered cap; the long, loose frock confined by a belt; the blanket clumsily wrapped about the loins; the leggings and the moccasin, have rarely been seen. The male Indian has long worn ready-made garments "same as white man," while the other sex follow, as well as they know how, the fashions that come originally from European capitals.

A wedding on Indian Island — that is in "society" — is a rare occurrence; one a year would be a surprising number. At present, Sunday is the approved day for this ceremony. There was one on a certain mid-winter Sunday which I can describe. The marriage proper, in the chapel, was as the priests always make it, in this country, without respect to color, race or social position. On leaving the church, the wedded pair separated, for not until the next night, in the midst of the dances, do the bride and bridegroom appear together again.

Well back from the road on Indian Island stands a long, low building, toward which, over an ample yard, dim forms were descried hastening, in the early winter darkness. There is only a single portal, with a narrow door, for entrance or exit. You enter, and see that there is no window, except a few panes of cobwebby glass at one end of this long, low and only apartment of the building, constituting the assembly hall of this community. The floor is worn so smooth that it reflects the light from the lamps that hang from the low ceiling. A very hot stove in a corner of the apartment makes the space about it uncomfortably warm, while all other parts remain uncomfortably cool. At the farther end is a very high narrow stage on which stands a piano covered with a red cloth. There are no chairs, but about the room is a continuous bench, along which sit or stand groups of slouchily dressed figures of each sex. The blue ceiling is relieved, here and there, by national emblems, — stars, eagles and stripes.

The hall is soon well filled with young Indian bucks and belles and squaws with babes in their arms. The young Indians are good-looking, after all, and their actions are scarcely more uncouth than those in similar gatherings of white people in neighborhoods remote from the more populous towns.

Big Thunder (an old man of tall, stooping figure) uttered a caution in regard to conduct. Then the rude music of the Island band was heard for a short time, following which an Indian of very handsome figure—a leading member of the tribe—made an address of welcome, and announced the dances.

Silence reigned for several minutes, when in a group of old men in the rear was heard a strong rattling. This is the only music used in the Tarratine dances.

"The Snake-dance," announced the handsome master of ceremonies, or floor manager. The others known to me are the Short-horn dance and the Micmac. On this occasion the bride and groom appeared and joined for a short time in the second dance,—long enough to show their good points and the bridal costume. When they withdrew, the dance became more violent, grew pranky, changed its form, and soon broke up, having lasted about an hour. The Micmac followed,—a sort of contra dance of a competitive character, in grace, vigor of action and endurance,—in which the squaws took a nearly equal part.

When the dancing was ended the bride and groom held a reception, which was followed by an irregular repast, and the festivities ended with the cutting and distribution of the bride-cake. It will be noted that these dusky-hued people are from year to year taking on the customary forms of the neighboring communities of English descent.

There have been Indian beauties, fashionably dressed and otherwise, seen by tourists on the steamboats that ply the river below Bangor. Molly Molasses was one of them, in the days of our grandfathers. Her portrait, by Hardy, not only delighted herself

but many others. This picture now adorns the reception room of the Tarratine Club, in Bangor.

A gentleman well-known in Maine, now an octogenarian, has sometimes mentioned having in his youth been surprised and moved, while on one of the large Boston and Bangor steamers, by an Indian girl of great personal loveliness, neatly attired in silks, who conversed intelligently and fluently, and who, on going ashore at some river town, took leave of her acquaintances with ease and grace. The same gentleman has also spoken of having passed, in a Bangor street, an Indian maid clad in a fine orange-colored gown, who attracted much attention by her plump, pretty face, the lofty toss of her well-poised head, the pride of her deliberate and dainty step.

Judging from later descriptions by other persons, it may have been the first of these beauties who became the wife of a gentlemanly, popular and efficient white official of the Penobscot region,—and who has borne him several sons and daughters,—apparently worthy young representatives of either race. As to the yellow-robed beauty with the Juno bearing, perhaps her pride has been curbed by some tall Tarratine chief,—possibly Big Thunder himself.

The dwellings at Indian Island are all framed structures; and not a log house nor a turf hut have been seen on the reservation at Oldtown for many years. By their occupations of farming, basket-making, lumbering, hunting, fishing, boating, and as guides for hunters, fishermen and tourists, many of the older members of the tribe have laid up sums of money that might well induce their children to provide liberally for them in their years of decrepitude.

As long ago as 1855, Joseph Paris owned and lived in a two-story house on Indian Island. It had blinds, was kept well-painted, and sat on a sort of terrace, and was surrounded by shrubbery. His wife was Molly Sochabasen, of the Passamaquoddy tribe.

She was far gone in the ways of the white people. The house had a carpet on the floor, and clean, white coverlets on the beds. Madame's dishes were displayed on the dresser of open shelves in showy piles and edgewise rows; and her cooking utensils were always of the proper hue. The principal rooms were painted and papered, and in the second story was a large reception room,—quite sufficient for the social entertainment of their large circle of friends,—who, of course, were of the Indian "upper class."

Miscegenation has largely invaded the last stronghold of the Tarratines, and there are white husbands of dusky wives, and *vice versa*. In consequence, there has arisen a state of feeling in the community as bitter, if not as violent, as that formerly, when the question of social morality was the disturbing element.

There are now on the island as fine houses as many Maine villages can boast, and wealth and superior race on one side are pitted against Indian aristocracy and wealth,—the intruding white persons and their spouses and near Indian relatives against the "pure-bloods" and their set.

A white woman has proved the firebrand that set the Tarratine pride aflame. She is known all over Maine as "Madame Bishop," the soothsayer. When a girl of eleven years she was given to the Indians by her white parents. She grew up to womanhood among them, entering fully into their modes of life. When about eighteen she married an Indian and bore him several children. About fifteen years ago she became a widow. Subsequently she traveled over the State, practicing everywhere a peculiarly weird system of fortune-telling, in which she is very proficient. It is stated that she has long had a regular clientage among well-known business men, who have had great confidence in her advice.

Not long ago Madame Bishop again married, and this time the benedict was a white

man. She took him to live with her at Indian Island, where she built a fine house, but being white, could only obtain the land by a lease. There has grown such jealousy of her among the pure-blooded families because of her occupation, influence, and her deportment toward them, that even the architectural ornament her residence furnished to the village only increased the feeling against her, and finally the head men of the tribe demanded that she and all other whites speedily remove from the Indian reservation.

Her invectives have been free and fearful against the Sockalexis, Francis, Nicolas, Sockabasins, and other exclusively pure-blood families; and, though all fear that her hostility may bring them bad luck, the tribal authorities determined that she and all others of her race, whether husbands or wives, must go; and the law is on their side.

A couple of years ago a dozen of the chief squaws (a term which some of them would now repel), under the guidance of an enthusiastic white woman of eminent social position, formed an organization under the name of the "Wa-ba-na-ki Club"; which has been admitted to the Maine Federation of Woman's Clubs.

Whether the hostility to the white fortune-teller will disappear by her admission into this charmed circle is an unsolved problem. The first president of the club is a pure-blood squaw of the tribe, and, withal, a handsome woman, and a self-possessed, clear and easy speaker of pure English.

When, two or three years ago, a citizen of Boston—a publicist with humanitarian tendencies—inquired of the leading people of the Oldtown Island what gift they would like from their Boston friends, they at once and emphatically declared for a library. In accordance with their wish, the gentleman provided them at once with \$200 for the purpose, and has been the means since of turning many volumes that way.

Yet literature had already taken root there, in native soil. As long ago as 1893, there

was published in Oldtown a book entitled "The Life and Traditions of the Red Men." Its author was Joseph Nicolas, a pure-blooded Tarratine, who was born and brought up amid the scenes in which his last years were passed. A daughter of his was for some years a teacher of the school on Indian Island, and in her grade she had few superiors in professional qualifications, in the entire county.

Mr. Nicolas says in his preface :

I . . . have given the full account of all the traditions as I have gathered them from my people. After forty years of search and study I am satisfied that no more can be found, as the old traditional story-tellers have all gone to the happy hunting ground.

"Klose-ker-beh, the man-from-nothing," says the book, "was claimed by all the children of the red men to be the first person who came upon the earth. And he was their teacher. He taught them how they must live, and told them about the spiritual power, and how it was in every living thing; and it was the same power which has sent him to prepare the way on earth for the generations to come; and to subdue all obstacles which are against the nature of man; and to reduce the earth to such a state as to become a happy land for the people."

The views of the Indians concerning the creation of the first man, and connected events, may be apprehended from the following curtailment and summary.

Klose-ker-beh, when he opened his eyes found himself lying on his back in the dust, his head toward the rising of the sun, the right hand pointing toward the north, and his left hand to the south. Though having no strength to move any part of his body, yet, in the bright day, he perceived all the glories of the world. The sun was at the zenith, standing still, and beside it was the moon, also without motion, while the stars were in their fixed places, and about them the firmament displayed its beautiful blue.

While the body of Klose-ker-beh (this peculiar being, who was not man) still clung to the dust, he was without mind, and his flesh

without feeling. At that moment the heavens were lit up with all kinds of bright colors, each standing by itself, as in a rainbow. In another moment every color shot a streak into the other, and soon all the colors intermingled, forming a beautiful brightness in the center of the heavens over the front of his face. Nearer and nearer came the brightness, until it almost touched his body; then feeling came into his flesh, and as he perceived the warmth of the approaching brightness he fell into a deep sleep.

The wind fanned his brow, and the power of sight was restored; but he saw not what he had before beheld. Instead of the brightness, a person like unto himself stood at his right hand, facing the rising sun. Afterward Klose-ker-beh knew this person to be the Great Spirit.

In silence his glorious visitor raised his right hand toward the east and moved it quickly thence to the place of the setting sun; immediately a streak of lightning followed the motion of his hand from one side of the earth to the other. Again, he raised his right hand, pointing first to the south, then swinging it to the north, when another streak of lightning followed the movement. Immediately after the passage of the lightning over Klose-ker-beh a sense of thought came to him. The first thought was that the shining one at his side brought him strength. The Great Being answered his thought, speaking these words :

Thou doest well believing in me. I am the head of all thou beholdest; and as thou believest, arise from thy bed of dust, and stand on thy feet; and, as thou believest, thou shalt have strength to walk.

Immediately strength came to Klose-ker-beh, and he arose to his feet and stood beside the Great Being. Following this, the latter turned half round toward his right, facing the sun; then, lifting both hands and looking up, he said, "Go thy way!" And immediately the whole heavens obeyed. The sun, moon, and all the stars moved toward

the setting of the sun. The night came slowly toward them. The Great Being raised his voice again, saying : " Let us make man in our own image."

He dropped his hands, and cast his eyes upon the land, and turned half way round toward his right hand, facing the setting of the sun ; then he swept his right hand from the north to the south. Again the lightning followed the movement. Next, he passed his hand from the setting of the sun to the point of its rising ; but when the lightning came upon the night, which was approaching, it disappeared ; and the darkness hid from them what was beyond the night.

Immediately the dust of the land began to shake and to heave in the form of a cross, where the Great Being had made a motion. And behold ! there was the image of a man lying on the ground, — his head toward the north, and his feet toward the south ; his right hand pointing toward the setting of the sun, while his face was toward the blue skies. His face was pale, to whiteness, because life was not yet in him.

The Great Being then said to Klose-ker-beh, " Turn thy face to the setting of the sun." He obeyed. Again the Great Being spoke and said : " I will not suffer thee to see this man arise to his feet, like thyself ; therefore go thy way toward thy right hand, and seek thy companions. I will be thy teacher, and thou wilt be their teacher." And Klose-ker-beh departed.

In a later period, says Nicolas, the name *Klose-ker-beh* came to signify a man of falsehood, or more rudely expressed, a liar.

At the opening of the second chapter of this Tarratine book, it is said that Klose-ker-beh, with the aid of May-May (the woodpecker), destroyed the serpent, which represented the beasts.

Klose-ker-beh told the red men that the Great Being had established his number both with the red men and the white men ; the number of the first being seven, and of

the latter, three ; " and because his numbers are few he shall live fast and pass away quickly."

" The first mother," Klose-ker-beh told the people, " when she had many children, and yet seemed lovely to her husband, and fair to all, appeared more and more unhappy. She besought her husband to kill her, which, she said, would result in his and the people's loving her always."

Her husband, in his distress, went and consulted Klose-ker-beh about the matter, and was told to do as the woman requested. So the man killed her, then dragged her body so far for burial that the flesh was worn from the bones. Weeks later, the people found, growing in the trail, the green blades of a plant.

After seven moons had passed, the husband went along the trail, and found ripened corn ; and where her bones lay he found tobacco growing. Both plants were previously unknown to this young race.

" So woman was loved forever," says the book of Nicolas. " She had, when she first came, claimed her origin from a beautiful green blade. Corn will give strength to the body ; tobacco, to the mind." Such, says the book, is the instruction which Klose-ker-beh gave the people.

What the religion of these Indians was previous to the settlement of the French missionaries among them, is not quite clear. It is, however, apparent that ideas imbibed from their earliest Christian instructors have become interwoven with the original Indian lore, in the formation of these traditions of the Tarratines, but of this the author does not seem to be in the least conscious.

In the statements concerning the origin of man, the traditions appear to outdo Darwin, who only goes back to the beasts for a predecessor, while Klose-ker-beh derives man from the dust, as in the Mosaic account, but represents woman as springing from a living but still inanimate object.

The Green Bag.

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WITH this number of THE GREEN BAG the undersigned retires from the editorial chair of the magazine. In giving up the work in which I have been engaged for the last twelve years, I desire to express to my brethren of the legal profession my deep sense of gratitude for the uniform kindness and courtesy which they have ever manifested toward me. But for their valuable aid, at all times cheerfully given, and the genuine interest which they have always displayed, THE GREEN BAG could never have attained the success which it has achieved. I resign my duties with feelings of the most sincere regret, but I trust that in other and younger hands, THE GREEN BAG may be made more "entertaining" than in the past, and more worthy the commendation of its readers.

HORACE W. FULLER.

FACETIÆ.

RUFUS CHOATE once defended a blacksmith whose creditor had seized some iron that a friend had lent him to assist in the business after he had been through bankruptcy. 'The seizure of the iron was said to have been made harshly. Choate thus described it: "He arrested the arm of industry as it fell towards the anvil; he put out the breath of his bellows; he extinguished the fire upon his hearthstone. Like pirates in a gale at sea, his enemies swept everything by the board, leaving, gentlemen of the jury, not so much—not so much as a horseshoe to nail upon the door post to keep the witches off." The blacksmith, sitting behind, was observed to have tears in his eyes at this description, and a friend noticing it said, "Why, Tom, what 's the matter with you? What are you blubbering about?" "I had no idea," replied Tom in a whisper, "that I had been so abominably abused."

At a dinner given by a Dublin Orangeman, when politics ran high, and Bushe was suspected of holding pro-Catholic opinions, the host indulged so freely that he fell under the table. The Duke of Richmond, who was then Viceroy, picked him up and replaced him in the chair.

"My Lord Duke," said Bushe, "though you say I am attached to the Catholics, at all events I never before assisted in the 'Elevation of the Host.'"

IN an action of assumpsit for work and labor done, the plaintiff sought to recover on a *quantum meruit*. The justice, who was as loquacious as Justice Shallow, and knew about as much Latin, undertook to explain the phrase to the jury.

"The term *quantum meruit*," he said, "is composed of two Latin words, and as you, gentlemen, have never studied that language, it will be necessary for me to elucidate them. When a man works for another he ought to know what he is going to get, and if he does not it is his own fault, and he can only recover (*quantum*) as much as (*meruit*) the defendant thinks he deserves and no more."

IN a contest over a will, the husband of the deceased was on the stand. During the cross-examination of this witness, a leading lawyer asked the witness sternly:

"Did the transaction take place before you married the dead woman?"

The witness who was a small man with a shrill voice, piped out indignantly:

"No, sir, she wasn't dead when I married her."

SIR FRANK LOCKWOOD was once engaged in a case in which Sir Charles Russell (the late Lord Chief Justice of England) was the opposing counsel. Sir Charles was trying to browbeat a witness into giving a direct answer, "Yes," or "No."

"You can answer any question yes or no," declared Sir Charles. "Oh, can you?" retorted Lockwood. "May I ask if you have left off beating your wife?"

THEY are very proud out in ——— County of their new courthouse. The other day Judge S—— was showing the building to a party of visitors, consisting of a couple of minis-

ters and several ladies. As they stopped at the end of the hall, where they could look into a room set apart for attorneys, the Judge said: "This is what we call the 'cuss room.'"

"What is that?" asked one of the white-chokered gentlemen, his interest aroused.

"Well, Doctor, here 's where the lawyers can come and swear at the Court. They *have* to do it sometimes."

NOTES.

THE MANCHESTER NEWS, in noting the recent arrival in England of America's most successful after-dinner speaker, Mr. Chauncey Depew, says there is only one instance on record when he was at a loss in public; the rebuff came from Mr. Evarts, the wittiest advocate at the American bar. Mr. Depew, at a certain banquet, was rather annoyed at a request to speak before Evarts, and after having finished his oration, he retired to the lower end of the hall to await the criticism. Mr. Evarts reeled off a review of American history from Noah to Narragansett Pier without a single pause. Depew started to his feet, exclaiming, "Are we to listen, Mr. Chairman, to sentences of this length all evening?" Without a moment's pause, Mr. Evarts retorted, "Hitherto, Mr. Depew, I had imagined that only the criminal classes objected to long sentences." And even the "great Chauncey" could think of no reply.

THE following curious chattel mortgage is on file at the Recorder's Office in Washington, Ia.:

"June the 31, 1892—From me, Peter E. Willmer of Wayland, Henry County, Iowa, to you, John Wittrig, of Crawfordsville, Washington County, Iowa, give this day under your hand all movable properties, including stök, grain, utensils, furniture, etc., for the sum of \$600 (six hunthret dollars). I, the undersigned, give this in your hand as a mortgage until the amount of debt is paid. Peter E. Willmer.

"In God we trust."

AMONG the most noble army of Serjeants-at-law—noble chaps in coifs and silk were they—Sir John Maynard in the last half of the seventeenth century conspicuously ranked. He

was what few Serjeants-at-law of the period were—a joker. His fee book showed almost a daily crop of guineas. On one occasion a grateful client, after obtaining unexpected success in his suit at law, sent Sir John a bushel of apples into each of which had been pressed a golden guinea. Cutting one open he discovered the extra fee and remarked: "I have often heard of the golden pippin of Devonshire, but never before tasted one.

Sir John Maynard, on another occasion, had another grateful farmer client send him a sucking pig dressed ready for roasting. When it came to the table and the knife entered the dressing, out fell fifty gold pieces. "It is generally considered a sin to kill and roast a guinea pig," Sir John cried, "but on this occasion the sin shall be condoned."

There was another humorous Serjeant of the reign of Queen Bess, at a time when Protestantism ran mad and the law forbade any one to aid a priest in performing Mass, and punished the ecclesiastic himself. Now this Serjeant, bearing the honored name of Plowden, was a Roman Catholic. Having privately attended Mass at the private chapel of a Squire of the old faith while upon circuit, the Serjeant was prosecuted. He stood trial, and in cross-examining the officiator, whom the Crown used as a witness in its behalf, it transpired that the priest had not been fully ordained. Serjeant Plowden immediately moved and obtained his acquittal, remarking, "No priest, no Mass, no offence."

Serjeant Whitelocke, a contemporary of Serjeant Maynard, had become an octogenarian when William III. of Orange became King. The Serjeant was a great Protestant, and when carrying an address from subjects to the King, the Monarch was pleased to refer to his eighty-six years and to say, "You must have outlived all your contemporaries." Rejoined Serjeant Whitelocke, "If your Majesty had not come over to save us from King James, I should have outlived even the law."

Serjeant Heywood, who lived in the time of the witty Jekyll, owned a saddle horse that had long served him upon circuit and which he had named "Pleader." The faithful nag died when what turfmen rank "aged." Jekyll, condoling with the Serjeant, said, "let the Bar attend the funeral of the horse, give him a decent burial,

and raise a stone to his memory with this inscription :

Here lies a Pleader who ne'er urged a plea ;
A Circuiter who never took a fee.
From Court to Court to serve his friends he'd go,
And tho' a mute, a firm support bestow.
Thro' thick and thin he'd surely keep his way,
Carry his client safe and win the day !
Our care is now to here support his fame,
" Report " his merits and " record " his name.
To tell the world a Pleader lies below
Who by false steps or tricks ne'er made a foe.
No petulant disputer he ! Would say
No contradictory word beyond a simple neigh.
Once on his legs, a sure and safe support,
He'd carry jury, witnesses and Court.

A JUSTICE of the Peace in Calaveras County, Cal., had a case that puzzled him not a little. An Indian had been arrested for breaking into a cabin and stealing a pair of breeches and was formally charged with burglary. The old justice took all the testimony down in writing, as he is required to do under the code, and, as it was conflicting in character, he was in a quandary.

Two or three witnesses had testified positively to the fact that the Indian had been in the immediate vicinity on the day of the theft, others that they had seen the breeches in his possession, while several others swore just as positively that he was in a different part of the county when the crime was committed. After reading the evidence over carefully, the justice announced that he would take the case under advisement until the next day.

When the time came for deciding the case the old justice took his seat at his desk, cleared his throat and announced :

" The law makes it my duty to weigh the evidence for or against the accused and to decide according to the most ponderous."

The justice procured a pair of gold scales, and placing the written evidence against the accused in one pan and the evidence in his favor in the other, announced as the pan containing the incriminating testimony went down :

" The weight of evidence is against the accused. He is held to answer before the Superior Court for the crime of burglary with bail fixed at \$1,000."

The superstitious Indian thought the scales were a contrivance for getting at the truth, and when they decided against him broke down and confessed.

THE late Ambrose L. Jordan, once Attorney General of New York State, was a personification of acrimony, and the late Daniel Lord was a lawyer of unexampled mildness, but could give on occasion the retort severe. To the jury Mr. Jordan observed : " When I found who my opponent was to be in this case, I thought I was to meet a gentleman, but I am disappointed." In his reply, Mr. Lord said, " When I entered into this defense I knew that I was not about to meet a gentleman, and consequently I am not disappointed."

SUPREME Court Justice James Roosevelt of New York city, an uncle of the Republican candidate for the Vice Presidency, had been at Chambers much annoyed by motions and cross-motions, adjournments and arguments in a controversy between two quack doctors respecting the manufacture of some pills ; each claiming patent right to the pills. Counsellor Dyatt, an advocate of learning and wit, in bringing a new motion humorously observed, " I do not wish to dose your Honor with these pills too often, but on this counter-affidavit I submit that my adversary is in contempt."

" Let him," interrupted Judge Roosevelt, " purge his contempt with these pills ; and I perceive by the label on the box that they influence the diet (Dyatt)."

LEGALLY considered, Christmas reflects this sentiment,—Know all men (and women) by these presents.

THE late Oakey Hall was once connected with an American paper in London. His aim here was to achieve a high name at the English bar. He was the son of an Englishman, he told me once, and therefore he was in English law an Englishman, whenever he chose to declare himself. He made no success because he lived wholly in the past, and his mental inclinations were solely reminiscent.

From the day of his mysterious disappearance from New York he lost the power to utilize his brain in any way that could earn him a living.

When he returned from Europe after that disappearance, he and I were closeted for months together in the office of Mr. Hulbert's New York World. Then it was that he told me the truth about his disappearance, and without knowing whether or not it has been published in America, I will repeat it briefly.

He said that one morning he woke up in a hall bedroom in Mayfair, in the heart of London, and as he lay in bed looking with wonder at his surroundings, a woman knocked and entered the room. She asked him if he would have his usual breakfast. He inquired what his usual breakfast was, and she, astonished in her turn, told him that he always had a pennyworth of tea, a penny roll, a penny pot of butter and an egg which cost a penny.

He asked her to sit down, and then, by cross-examining her, he found that he had lived a whole season in that house under a name he never knew, that he appeared to be "a city man" (English for a man of business), that he went out every morning, came back every evening, went very frequently to the theatre, and was the quietest, most irreproachable of all her lodgers. "In a word," he said, "I had lived the life of another man for months, unconscious of my own identity, unrecognized by any one, and fulfilling the well-rounded half of a dual existence."

IN Iceland there are no prisons, and the inhabitants are so honest in their habits that such defenses to property as locks, bolts and bars are not required; nor are there any police in the island. Yet its history for 1000 years records no more than two thefts. Of these two cases, one was that of a native, who was detected after stealing several sheep, but as he had done so to supply his family, who were suffering for want of food, when he had broken his arm, provisions were furnished to them and work was found for him when able to do it, and meanwhile he was placed under medical care; but the stigma attached to his crime was considered sufficient punishment.

The other theft was by a German, who stole seventeen sheep. But as he was in comfortable circumstances, and the robbery was malicious, the sentence passed upon him was that he should sell all his property, restore the value of what

he had stolen, and then leave the country or be executed, and he left at once.

But, though crime is rare in Iceland and its inhabitants are distinguished for honesty, and purity of morals, there is, of course, provision for the administration of justice, which consists, first of all, in the sheriff's courts; next, by appeals to the court of three judges at Reykjavik, the capital; and, lastly, in all criminal and most civil cases, to the supreme court at Copenhagen, the capital of Denmark, of which kingdom the island forms a part. The island of Panaris (one of the Lipari group), is equally fortunate in having neither prisons nor lawyers, and being absolutely destitute of both paupers and criminals.

LITERARY NOTES.

WILLIAM GARROTT BROWN opens the November ATLANTIC with a notable defense of American parties, in which he shows the absolute necessity of two strong controlling parties in a representative government like our own, and traces the principles and the history and development of "the two Genii who now serve the Republic." Two brilliant and entertaining serials begin in this number: Miss Jewett's "The Tory Lover," a tale of love and adventure during the American revolution, treated from a hitherto untouched side, the fortunes of the Loyalists; and Mrs. Wiggan's "Penelope's Irish Experiences," a completion of the delicious trilogy of feminine fun and adventure throughout the united kingdom which has delighted so many readers. The other contents are of musical interest.

THE great Trans-Siberian Railway, described by Henry Norman in his series on "Russia of To-day," leads the November number of SCRIBNER'S MAGAZINE. This railway is the commercial and political key to the far east, and Mr. Norman traveled its entire length so far as completed, to Lake Baikal and beyond. He describes the wonderful industrial possibilities of the country through which he passed and gives an entirely new idea of Siberia. Instead of a desert it promises to be the leading wheat-producing country of the world, and the railway opens up immense mineral possibilities. Mr. Norman says that since the great wall of China the world has seen no one material undertaking of equal magnitude. The cost of this railway will be about \$500,000,000, and its total length 5,486 miles. Illustrated throughout with the author's photographs.

THE NEW LIPPINCOTT MAGAZINE for November opens, as usual, with a complete novel. The one presented this month maintains the always high standard. It possesses the charm of uncommon scene and quaint characterization. It is entitled "Madame Noel," and the author is George H. Picard, who is especially liked for his books, "A Mission Flower," and "A Matter of Taste."

The shorter fiction of the November NEW LIPPINCOTT is plentiful and varied in theme. "The Beat that Failed" is by Albert Payson Terhune, who by the way, is a son of "Marion Harland." It is a newspaper story beginning just at the hour of going to press, and the incident related is most exciting and realistic. Stewart Edward White contributes a tale called "The Race," which in his own words is "blood-and-thunder, but true." But it has a tender side to it.

WHAT SHALL WE READ?

In *Rulers of the South: Sicily, Calabria and Malta*, Mr. F. Marion Crawford has written an interesting final chapter upon the Mafia in Sicily, which is full of information, derived in part from a recent work by the Chief of Police of Palermo, and also from Sicilians who have had intimate relations with the society. This work is in two volumes, illustrated and presented in the same handsome way as *Ave Roma Immortalis*. Most of the illustrations are from drawings by Mr. Brokman, an artist little known in this country, but who has been the author's companion during his studies in Sicily and Calabria.

Mr. F. Marion Crawford's new novel is called *In the Palace of the King; a Love Story of Old Madrid*. It is an historical romance of the time of Philip II. of Spain. The plot is laid in the Spanish court, and the period—that of the discovery of America—was perhaps the most magnificent of the prosperous days of Spain. Such a period has afforded Mr. Crawford an opportunity similar to that which was given him by the crusades in "Via Crucis," to place his story in the most romantic and brilliant surroundings. The hero of the story is the famous Don Juan of Austria, son of the Emperor Charles V. who won back Granada a second time from the Moors. The heroine is Dolores de Mendoza, a high-spirited and beautiful young woman.

A dainty little volume entitled *The Pilgrim Shore*¹ takes the reader through historic ground. Beginning with Dorchester the author treats of the Mas-

¹ THE PILGRIM SHORE, with many little picturings, authentic and fanciful. By Edmund H. Garrett. Little Brown & Co., Boston. Cloth. \$2.00.

sachusetts coast as far as Plymouth. There are plenty of reminders of famous personages of the past, left in such towns as Quincy, Hingham, Scituate, Marshfield, Duxbury, etc., which are passed through before reaching Plymouth, and Mr. Garrett describes in a charming chatty way the varied scenes and incidents recalling our pilgrim fathers. Exquisite illustrations add to the beauty and value of the book.

*A Life of Francis Parkman*² is a valuable addition to biographical literature. The author, Mr. Farnham, knew Mr. Parkman, and his work has been done with the sanction of the historian's nearest relatives, and with their assistance as far as information of a personal character is concerned. He has devoted much study and labor to the preparation of his work, and has had access to all the available material in the hands of Mr. Parkman's family and friends, including such letters as have been preserved, the diary of his vacation journals, and the extremely interesting autobiographic letters written by the historian to his friends, Dr. George H. Ellis and Martin Brimmer.

Anything from the pen of Mary Hallock Foote is always welcome, and her latest story, *The Prodigal*,³ will be warmly received by her host of readers. It is written in her best vein and is a graphic and pathetic recital of the struggles of an English youth to recover the position in society which has been forfeited by his wildness and folly.

*Through Old Rose Glasses*⁴ is a collection of short stories by Mary Tracy Earle. They are written in a charming style, and are of more than usual interest. The volume is one that will not only entertain but will satisfy the reader.

The Rebellion of Nathaniel Bacon in Virginia, furnishes Miss Ewell with material for her story entitled, *A White Guard to Satan*.⁵ The book abounds in stirring scenes, and enlists the reader's interest from the opening page.

² FRANCIS PARKMAN. By Charles Haight Farnham, with portraits. Little Brown & Co., Boston, 1900. Cloth, \$2.50.

³ THE PRODIGAL. By Mary Hallock Foote, with illustrations by the author. Houghton, Mifflin & Co., Boston, 1900. Cloth, \$1.25.

⁴ THROUGH OLD ROSE GLASSES. By Mary Tracy Earle. Houghton, Mifflin & Co., Boston, 1900. Cloth, \$1.50.

⁵ A WHITE GUARD TO SATAN. By Alice Maud Ewell. Houghton, Mifflin & Co., Boston, 1900. Cloth, \$1.25.

NEW BOOKS FOR LAWYERS.

A BRIEF FOR THE TRIAL OF CIVIL ISSUES BEFORE A JURY. By AUSTIN ABBOTT. The Lawyers' Co-operative Publishing Co., Rochester, N. Y., 1900. Second and enlarged edition. Law sheep. \$4.50.

Abbott's civil trial brief has for many years been the favorite handbook of trial practice of practising lawyers throughout the United States. While first written with special reference to the New York practice, it was useful in every State. The scope of this edition, however, has been enlarged to include every State in the Union, making it equally valuable in any jurisdiction, from Maine to California. The enlarged scope of this new edition may be understood when it is known for instance that 23 of the 39 sections in the first division of the work represent each an additional point of practice. Five entirely new divisions have been added on (1) Enumeration of Witnesses; (2) Impeachment and Corroboration of Witnesses; (3) Absence of Judge, and Proceedings outside of Court room; (4) Improper Conduct of Judge; (5) The Verdict and its Incidents.

ELEMENTS OF AMERICAN JURISPRUDENCE. By WILLIAM C. ROBINSON, LL. D. Little, Brown & Co., Boston, 1900. Buckram. \$3.00, *net*.

This is in every way an admirable book for law students, for whom it is especially designed. Mr. Robinson has the faculty of condensing into a few terse sentences a clear and accurate statement of the point to be presented, so that the student, using this volume and reading in connection therewith the suggested text of other authors and citations of cases, cannot but find it an especial aid in attaining a full understanding of elementary jurisprudence.

THE LAW OF OPERATIONS PRELIMINARY TO CONSTRUCTION IN ENGINEERING AND ARCHITECTURE. By JOHN CASSAN WAIT, M. C. E., LL. B. John Wiley & Sons, New York, 1900. Cloth, \$5.00.

This book is a companion volume to the author's

earlier work on Engineering and Architectural Jurisprudence, or the Law of Construction. It has been published to meet a demand on the part of the progressive members of the engineering and architectural professions, including those engaged as contractors and builders, who have wished to know the property rights incident to and attending the operations which they have in hand. These men have for a long time wanted a work to which they could refer for information on the subjects of riparian rights, when pitted against those of their patrons and clients who detain, divert, appropriate, or pollute bodies and streams of water; or the rights of land-owners when they seek to utilize nature's stores of water, oil, gas, coal and other minerals and sources of power. They have often wanted a hand-book to assist in the interpretation, construction and application of descriptions, to the boundaries and limits of estates, and to explain how new made or reclaimed land shall be subdivided among coterminous owners. Throughout the book the principles and application of the law are illustrated by examples which have occurred in operations of contract work and which may arise any day in the experience of every engineer, architect, contractor, builder or owner who is engaged in promoting and carrying out new projects. These instances are in themselves interesting reading, and they become doubly so when a lesson is drawn from them.

OUTLINE STUDY OF LAW. By ISAAC FRANKLIN RUSSELL, D. C. L., LL. D. Third edition. Baker, Voorhis & Co, New York, 1900. \$2.50.

One desiring to obtain an understanding of the general principles of law will find this book most admirably adapted to his needs. Since the first edition, which we noticed at some length in *THE GREEN BAG*, was published, Professor Russell has thoroughly revised and made additions to the text. The volume is one which ought to be in the hands of every law student, and might be used with profit as a textbook in our high schools and colleges.



